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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 259

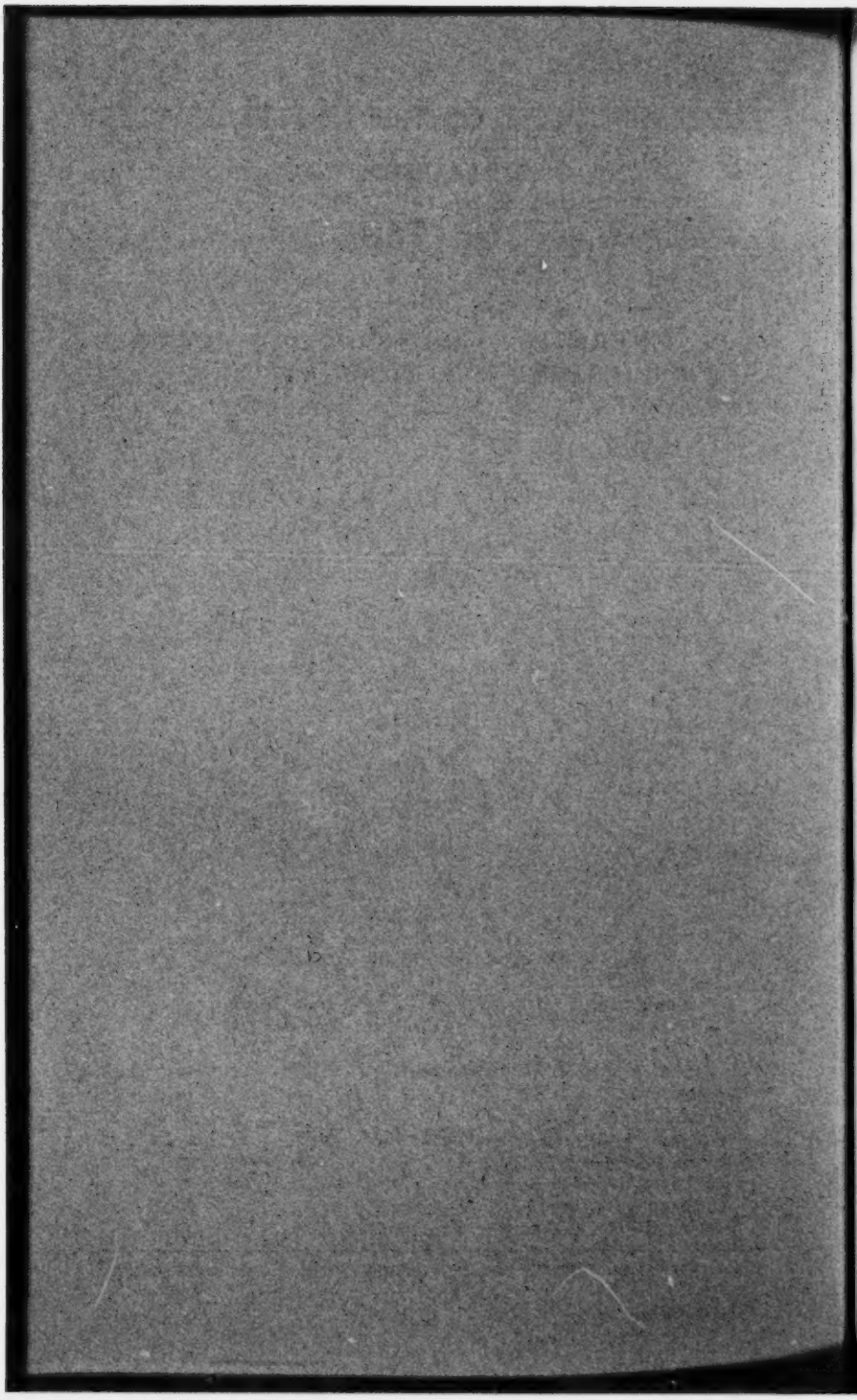
H. CLYDE REEVES, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY, APPELLANT,

vs.

BEN WILLIAMSON, JR., TRUSTEE OF THE KENTUCKY FUEL GAS CORPORATION

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED JULY 31, 1942.



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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

INTERVENING PETITION OF H. CLYDE REEVES—Filed April 11, 1941

To the Hon. H. Church Ford, Judge of the District Court for the United States for the Eastern District of Kentucky:

Your petitioner, H. Clyde Reeves, states that he is the duly appointed, qualified and acting Commissioner of Revenue of the Department of Revenue of the Commonwealth of Kentucky, and as such is its executive and administrative head and that the Department of Revenue has the statutory duty of assessing the tax prescribed by Section 4077-4091, Carroll's Kentucky Statutes, 1936 Edition, and Supplement thereof, and that the Department of Revenue, and he, as the Commissioner of Revenue, has the duty of collecting all delinquent and omitted taxes owing to the Commonwealth of Kentucky.

He states that the Kentucky Fuel Gas Corporation is a Corporation organized under the laws of the State of Delaware and was and is qualified to and did and does business in the Commonwealth of Kentucky, and that prior to January 1, 1938, and until the present, the corporation operated and did business in Kentucky under the trusteeship of Ben Williamson, Jr., who was duly appointed in bankruptcy action No. 991-B in the United States District Court for the Eastern District of Kentucky pursuant to a petition filed therein by creditors and stockholders in accordance [fol. 4] with the reorganization statutes 77B of the Federal Bankruptcy Statutes, Revisions and Amendments thereto by the Chandler Act for the purpose of affecting a reorganization of said corporation.

The said H. Clyde Reeves states that the Kentucky Fuel Gas Corporation is a corporation coming within the provisions of Sections 4077 through 4091, Carroll's Kentucky Statutes, 1936 Edition and Section 4077 of Baldwin's 1938 Supplement to Carroll's Kentucky Statutes, and that while under the trusteeship of Ben Williamson, Jr., said corporation operated and transacted business and owned property during the period from January 1, 1938, to December 31, 1938, the tax year.

Section 4077 Baldwin's 1938 Supplement to Carroll's Kentucky Statutes, provides:

"Every railway company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telephone company, telegraph company, press dispatch company, bus line company, common carrier trucking company, air transport company, palace car company, dining car company, sleeping car company, chair car company, tank car company, coal car company, pipe line company, and every other like company or business performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, wherein its franchise may be exercised.

"The property of such taxpayer shall be classified as operating tangible, franchise, non-operating tangible and non-operating intangible.

"Non-operating intangibles within the taxing jurisdiction of the Commonwealth shall be taxable for State purposes only at the same rate as the intangible property of other taxpayers not performing public services, and tangi- [fol. 5] ble property whether operating or non-operating shall be subject to State and local taxes at the same rate as the tangible property of other taxpayers not performing public services.

"The Department of Revenue shall have sole power to value and assess all of the property, including the franchise, of every corporation, company, association, partnership, or person performing any public service, including those enumerated above and all others to whom this section may apply, whether or not such operating or non-operating tangible or non-operating intangible, or franchise values have heretofore been assessed by said Department, and shall apportion such assessments of franchise as provided by section 4081 of the Statutes and shall certify tangible property to the counties, cities, towns and taxing districts where said property is situated. Provided, however, that in the case of a taxpayer whose business is predominantly non-franchise and the franchise or public service business in which he is engaged is merely incidental to his principal business, the Department shall in the exer-

cise of its judgment and discretion, determine from evidence which it may have or obtain, what portion of the capital and property is devoted to the public service business subject to assessment by the Department under this Act, and shall require the remainder of the property not so engaged to be assessed by the local taxing authorities."

During our tax period $275,000.00 not used in the operation of the franchise business and hence being non-operating intangible property was invested in postal savings deposits.

This property was assessed at 50c per $100 valuation, in accordance with Section 4019 Baldwin's 1938 Supplement to Carroll's Kentucky Statutes, reading as follows:

"An annual ad valorem tax for state purposes of five (five) cent- each one hundred dollars (one hundred dollars) [fol. 6] of value of all real estate directed to be assessed for taxation, as provided by law and fifty cents upon each one hundred dollars (one hundred dollars) of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed; except a tax at the rate of one-tenth of one per cent (one-tenth of one per cent) shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, as now provided by law; and also including building and loan associations incorporated under the laws of this State, and making loans to members only, which association shall be assessed except as otherwise provided by law in the manner and at the rate now set forth in Chapter fourteen of the Acts of the extraordinary session of the general assembly of nineteen seventeen (Sections four thousand nineteen a-six, four thousand nineteen a-seven, and four thousand nineteen a-eight)."

The tax on this $275,000.00 amounted to $1,370.00.

The said H. Clyde Reeves says that said assessment and tax liability became final June 1, 1939, when notice thereof was received by said corporation, and that under the provisions of Section 4091 of Carroll's Kentucky Statutes, 1936 Edition, thirty days after notice of the amount of said tax was given by the Department of Revenue whose duty it is to collect same, said corporation must be considered

as delinquent, and the penalty of ten per cent under said section attaches amounting to $137.00 and that said penalty did attach on July 1, 1939, and that thereafter under said section such tax bears interest at the rate of ten per cent per annum. Section 4091 provides:

"All the state taxes assessed against any corporation, company or association, under this article, shall be due [fol. 7] and payable thirty days after notice of the same has been given said corporation, company or association by the auditor; and all county, municipal, school and other taxes shall be due and payable thirty days after notice of the amount of said tax is given by the officer whose duty it is to collect the same; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent (10%) on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent (10%) per annum. Any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor and, on conviction, shall be fined fifty dollars ($50.00) for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction. It shall be the duty of the county clerk to furnish to the auditor of public accounts, on blanks provided by the auditor, a statement of the assessed value of the tangible property of all corporations, companies or associations paying a franchise or other tax under this act.

"Any county clerk failing to comply with the requirements of this act shall be guilty of a misdemeanor and, on conviction, shall be fined not less than ten nor more than twenty-five dollars."

On October 18, 1939, the said H. Clyde Reeves says he timely filed in this action, with the trustee in bankruptcy, a verified proof of claim asserting the liability of the debtor for taxes, penalty and interest. The trustee refused and now refuses to pay the tax, penalty or interest on this item of postal savings deposits because the trustee claims (A) postal savings deposits are exempt from taxation by the State; (B) to tax postal savings at 50c per hundred and bank deposits located in the State at 10c per hundred is

discriminating. The trustee filed in this action exception to this tax claim.

The said H. Clyde Reeves says that this is a statutory [fol. 8] liability legally computed upon assessments made by the legally constituted Kentucky Tax Commission of the Department of Revenue; that — is no miscalculation, and that it is a just liability.

The rights of the Commonwealth can not be fully adjudicated without this intervention properly asserting its claim for determination upon the merits.

It is further stated that no part of this principal, penalty or interest has been paid, nor are there any set-offs of counter claims to same; that the Commonwealth of Kentucky has not, nor has any person by order of the Commissioner of Revenue, or to the knowledge or belief of the Commissioner of Revenue for the use of the Commonwealth of Kentucky had or received any manner of security for the debt whatsoever. The claim is a just one, a statutory liability legally due, computed upon assessments made by the legally constituted Kentucky Tax Commission and there is no miscalculation.

Wherefore, your petitioner prays that an order be entered giving your petitioner leave to intervene in this proceeding for the purpose of having determined the liability of Ben Williamson, Jr., as trustee of the Kentucky Fuel Gas Corporation for the claim as set forth herein or any portion thereof. Your petitioner further prays that a judgment be rendered against Ben Williamson, Jr., as trustee of the Kentucky Fuel Gas Corporation for its claim and for costs and all other relief to which he or the Commonwealth of Kentucky may be entitled.

Hubert Meredith, *Attorney General;* H. Appleton Federa, *Asst. Attorney General,* Frankfort, Kentucky, Counsel for Intervening Petitioner.

[fol. 9] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed April 11, 1941

Comes Ben Williamson, Jr., Trustee for the Kentucky Fuel Gas Corporation, and moves the Court to dismiss the intervening petition filed herein by the Commissioner of Revenue of the Commonwealth of Kentucky and seeking to

subject United States postal savings certificates held by the Trustee during the year 1938 to taxation for State purposes, because said petition does not state facts constituting a cause of action against the Trustee nor entitling the petitioner to any relief or recovery thereunder.

Robt. T. Caldwell, Porter M. Gray, *Counsel for Trustee.*

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed November 16, 1940

In Re: Proposed Assessment of United States Postal Savings Certificates for State Taxes

It is stipulated by the parties, by counsel, as follows:

1. During a portion of the year 1938, the Trustee of the Kentucky Fuel Gas Corporation held Postal Savings Certificates of the aggregate principal amount of $275,000.00, issued in his name as Trustee and purchased with funds of the estate of the Kentucky Fuel Gas Corporation through the Ashland, Kentucky, Post Office. These certificates were purchased, and later redeemed, through the Ashland Post Office in the manner described in the statement of the Postmaster hereinafter referred to.

2. The manner of handling Postal Savings funds received by the local Post Office and the manner of redeeming [fol. 10] Postal Savings Certificates is set out in a statement signed by Sara G. Friel, Postmaster at Ashland, Kentucky, a copy of which is attached to and made a part of this Stipulation by reference.

3. There is also attached hereto and made a part of this Stipulation by reference a copy of a Report made to the Federal Reserve Board, under date of October 12, 1940, and as of June 30, 1940, by B. F. Cain, Third Assistant Postmaster General, showing the funds then in the hands of the Postal Savings System and the extent to which same were invested in securities of the United States. It is agreed that the difference between the amount of "Total Assets" and the "Balance to credit of Depositors" shown in said report represents interest realized from investments.

H. Appleton Federa, *Counsel for Ky. Tax Commission;* Robt. T. Caldwell, Caldwell and Gray, *Counsel for Trustee.*

EXHIBIT TO STIPULATION OF FACTS

United States Post Office

Ashland, Kentucky

November 12, 1940

First Class

Mr. Ben Williamson, Jr., Trustee, Kentucky Fuel Gas Corporation, Ashland, Kentucky

DEAR SIR:

Replying to your request for information as to how postal savings certificates are handled.

All our receipts from the sale of postal savings certificates are forwarded each day to the postmaster at Louisville, Kentucky, which is the central accounting [fol. 11] post office for this state. I am not familiar with the way the money is handled when it reaches the Louisville post office. This office has no local bank deposit for postal savings funds.

When certificates are presented for payment, if the amount is small enough to be conveniently handled at this office, they are redeemed out of current cash on hand. If they are of a substantial amount, it is necessary to give notice to the Department at Washington a few days in advance of the date the certificates are to be paid and they forward a check from Washington in payment of the certificates, when delivered to this office properly endorsed.

Yours very truly, (S.) Sara G. Friel, *Postmaster.*

SGF m

EXHIBIT TO STIPULATION OF FACTS

Copy HAL:RBM

Filed Nov. 16, 1940

October 12, 1940

The Federal Reserve Board, Washington, D. C.

Attention V. Hodson

GENTLEMEN:

There are listed below data relative to the amount due postal savings depositors and the distribution of the Assets of the System as of the close of the month of June, 1940:

Balance to credit of depositors	$1,293,292,778.00
Total assets	1,336,612,432.25
Cash in depository banks	43,122,294.52
Total investments	1,224,332,188.70

[fol. 12] U. S. Gov't	$1,077,990,298.27	
Guaranteed	146,341,890.43	
Reserved fund and receivables		69,157,949.03

Very truly yours, —— ——, Third Assistant Postmaster General.

Note. The $146,341,890.43 guaranteed Government securities consist of investments in the Federal Farm Loan Corporation bonds and Home Owners' Loan Corporation bonds in which principal and interest are fully guaranteed.

B. F. C.

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed December 30, 1940

Comes the trustee for the Kentucky Fuel Gas Corporation by counsel, and the Department of Revenue of the Commonwealth of Kentucky by counsel, and stipulate the following facts:

That on June 29, 1940, the National Banks had total assets of $36,885,080,000, of which $9,373,592,000 were invested in obligations of the United States Government and

agencies and corporation of that Government, as set forth in the following manner:

National Banks—June 29, 1940,

(5,170 banks; total assets, $36,885,080,000)

Direct U. S. Government obligations:

Treasury bills	$581,008,000	
Treasury notes	1,649,690,000	
Bonds	4,989,192,000	
		$7,219,890,000

[fol. 13] Obligations guaranteed by U. S. Government:

Reconstruction Finance Corporation	$366,811,000	
Home Owners' Loan Corporation	1,066,195,000	
Federal Farm Mortgage Corporation	247,715,000	
Other Government Corporations and Agencies	210,615,000	
		$1,891,336,000
Total U. S. Government obligations direct and guaranteed		$9,111,226,000
U. S. Government Corporations' and Agencies' obligations not guaranteed by U. S. Government Federal Land Banks	$77,757,000	
Federal Intermediate Credit Banks	91,468,000	
Other Government Corporations and Agencies	93,141,000	
		$262,366,000
Grand Total U. S. Government Corporations' and Agencies' obligations, direct, guaranteed and not guaranteed by U. S. Government		$9,373,592,000

That the Social Security Board in their Old Age Insurance Trust Fund on August 31, 1940, had total assets of $1,893,078,000, and of this total assets $1,728,100,000 were invested in treasury notes of the United States Government. [fol. 14] That the Unemployment Trust Fund on August 31, 1940, the total assets were $1,817,015,000 of this fund $1,808,000,000 invested in certificates of indebtedness in the United States.

That the Railroad Retirement Account on August 31, 1940, had total assets of $194,188,000 of which $85,400,000 was invested in 3% treasury notes.

That as of December 31, 1938, the total admitted assets of Life Insurance Companies operating in the United States, totalled $29,579,000,000 and that 18% of these total assets consisted of United States Government bond-.

Caldwell and Gray, *Attorney—Ky. Fuel and Gas Corpn.;* H. Appleton Federa, *Attorneys—Department of Revenue.*

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed April 11, 1941

Came Clyde H. Reeves, Commissioner of Revenue of the Commonwealth of Kentucky, and tendered his petition for leave — intervene in this action for the purpose of having determined the liability of the Trustee of the Kentucky Fuel Gas Corporation for a tax claim alleged due the Commonwealth of Kentucky, and setting up said tax claim therein, and the Trustee, by counsel, being present and agreeing to such intervention, and the Court being advised, it is now ordered that leave is granted to the Commissioner of Revenue for the Commonwealth of Kentucky to intervene herein for said purposes and that said petition be filed and made a part of the record herein.

[fol. 15] Thereupon came the Trustee, by counsel, and tendered a motion to dismiss said intervening petition, and the tax claim therein asserted and the Court being advised, said motion is now ordered to be filed and made a part of the record herein.

Said cause being then, by consent of the parties by counsel, submitted upon the issues raised by said petition and

the motion to dismiss same, and the Court being advised, and having heard the parties thereon, the Court thereupon made and filed findings of fact and rulings of law, which are now noted of record. It is also ordered that the memorandum opinion of the Court upon the issues raised by the Trustee's Petition for Advice upon said tax claim heretofore filed herein be and is adopted by the Court and made a part of the record in this proceeding.

It is therefore now ordered and adjudged,

(1) That the tax claim asserted in said petition on behalf of the Commonwealth of Kentucky against the Trustee, seeking to subject said postal savings certificates held by the Trustee to taxation at the rate of 50c per $100.00, is discriminatory.

(2) That said postal savings certificates, or the deposits represented thereby, may not be constitutionally subjected to taxation by a State.

Wherefore said tax claim is denied, said attempted assessment is declared invalid and said petition dismissed, to all of which rulings of the Court the Intervening Petitioner objects and excepts.

H. Church Ford, *Judge.*

April 11, 1941.

[fol. 16] In United States District Court

Opinion—Filed April 11, 1941

This is a proceeding originally instituted for corporate reorganization under section 77-B of the Bankruptcy Act. The trustee of the debtor, Kentucky Fuel Gas Corporation, deposited funds of the estate in a Postal Savings Depository of the United States, under authority of Sec. 3 of the Act of Congress of 1933 (47 Stat. 1482, 11 USCA § 101a). As evidence of the deposits, he held United States Postal Savings Certificates aggregating $275,000 during the year 1938. The certificates were issued by the Postmaster General under the authority conferred by Sec. 5 of the Postal Savings Depository Act of 1910 (36 Stat. 815, 39 USCA § 755). Sec. 16 of the Act (39 USCA § 766) pledges the faith of the United States to their payment.

The trustee has filed in this proceeding a petition for

advice stating that on October 18, 1939, the Commissioner of Revenue of the Commonwealth of Kentucky filed with him a verified proof of claim asserting liability of the debtor and its trustee to the State of Kentucky for taxes assessed for the year 1938 upon the postal savings deposits evidenced by the certificates so held by the trustee, at the rate of fifty cents per one hundred dollars of value, together with the statutory penalty and interest imposed for delinquency. With his petition, he filed a copy of the proof of claim and states that he has refused to pay it on the ground that postal savings deposits are exempt from state taxation by the Constitution and laws of the United States. He prays for a ruling upon the question and for advice as to his duty in respect to it.

The Attorney General of Kentucky appeared on behalf of the State in support of the claim. The matter is submitted [fol. 17] for adjudication upon the trustee's petition for advice.

That property of a debtor in the hands of an operating trustee in a proceeding of this character is subject to the same tax liability which would be applicable to that of a corporation conducting like business in the state is not disputed. 48 Stat. 993; 28 USCA § 124a; Swarts v. Hammer, 194 U. S. 441; Boteler v. Ingels, 308 U. S. 57; Thompson v. State of Louisiana, 98 F. (2d) 108; Webster and Atlas National Bank of Boston v. Palmer, 111 F. (2d) 215.

The questions giving rise to this controversy are: Does the tax sought to be laid by the State upon the intangible property of the debtor, evidenced by United States Postal Savings Certificates, constitute such a burden upon or interference with the instrumentalities or activities of the Federal Government as to be beyond the power of the State by reason of implied constitutional immunity attaching to functions of the Federal Government, and, if not, are postal savings deposits "obligations of the United States" exempted by Congress from state and other local taxation by the provisions of Section 3701 of the Revised Statutes of the United States, (31 USCA §742).

In considering the first question, it is not material whether the purpose of the Act of 1910 (36 Stat. 814-819, 39 USCA §§751-769), by which Congress established the Postal Savings System within the Post Office Department, was merely to encourage and promote habits of thrift among the people, as contended by the Attorney General or

whether it was also designed as a means to facilitate the fiscal operations of the Government, as insisted by the trustee upon the authority of Farley v. Albers, 112 F. (2d) 101, for it is not claimed or suggested that the creation of the system was not an appropriate exercise of the constitutional powers of the Government. Whatever may [fol. 18] have been its original or underlying purpose, its present use is as an integral part of the governmental structure and, with respect to Constitutional immunity from state or other local taxation, it stands upon a parity with all other instrumentalities of the National Government. McCulloch v. Maryland, 4 Wheat. 316; Van Brocklin v. Tennessee, 117 U. S. 151; Smith v. Kansas City Title Co., 255 U. S. 180; Federal Land Bank v. Crosland, 261 U. S. 374.

In recent years the Supreme Court has frequently had occasion to review and reconsider the historic problem of implied constitutional limitation on the power of both the State and the National Governments to tax the instrumentalities or activities of the other. James V. Dravo Contracting Co., 302 U. S. 134; Helvering v. Moutain Producers Co., 303 U. S. 376; Helvering v. Therrell, 303 U. S. 218; Helvering v. Gerhardt, 304 U. S. 405, and Graves v. N. Y. ex rel. O'Keefe, 306 U. S. 466.

Whatever changes or modifications of views expressed in earlier opinions these later decisions reflect as to certain aspects of inter-governmental tax immunity, they indicate no departure from the traditional doctrine that the functions, activities and instrumentalities of the Federal Government are immune from all State or local taxation which, in its effect, operates to discriminate against the exercise by Congress of its constitutional powers or which adversely affects the use of the means employed to carry those powers into execution.

In Helvering v. Gerhardt, 304 U. S. 405, the Court refers to the fact that the doctrine stems from McCulloch v. Maryland, 4 Wheat. 316, and, in commenting upon the conclusions of Chief Justice Marshall in that case, said:

"It was perhaps enough to have supported the conclusion that the tax was invalid, that it was aimed specifically at [fol. 19] national banks and thus operated to discriminate against the exercise by the Congress of a national power. Such discrimination was later recognized to be in itself a

sufficient ground for holding invalid any form of state taxation adversely affecting the use or enjoyment of federal instrumentalities."

In his concurring opinion in Graves v. N. Y. ex rel. O'Keefe, 306 U. S. 466, 488, Mr. Justice Frankfurter says:

"Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government."

The Statutes of Kentucky (Section 4019-2 Baldwin's 1939 Supplement to Carroll's Kentucky Statutes) impose an annual ad valorem tax for state purposes upon deposits in any bank, trust company or combined bank and trust company organized under the laws of the state or in any national bank of the state at the rate of ten cents on each one hundred dollars of value, (one-tenth of one per cent). All other tangible and intangible personal property, with a few specified exceptions not here material, is taxed at the rate of fifty cents on each one hundred dollars of value, (one half of one per cent). It is not claimed that postal savings deposits are embraced within the provisions of the [fol. 20] statute fixing the low tax rate on bank deposits. The Attorney General in his brief says:

"Even a cursory examination of this statute will reveal that Postal Savings Deposits cannot be brought within the provisions of these sections. Hence Postal Savings Deposits may not be taxed at this rate. All property except that which is expressly exempted by the Kentucky Constitution or Federal law must be taxed for State purposes; and as these deposits cannot be taxed at the ten cent rate, there remains then only the fifty cent rate. Thus the Commonwealth of Kentucky must tax Postal Savings Deposits at the fifty cents per one hundred dollar rate."

Thus by applying to them the so-called "catch all" provision of the statute, the State asserts the right to tax postal savings deposits at five times the rate imposed upon deposits in banks of the state.

While the direct burden of the tax falls upon the owners of the intangible property rights evidenced by United States Postal Savings Certificates, it can scarcely be doubted that the effect of laying a tax load upon them which is substantially heavier than that imposed upon the holders of the same type of property within the state, represented by deposits in banks, will inevitably tend to curtail the use, cripple the growth and retard the development of the postal deposit facilities and thus injuriously affect the means employed by the Government to accomplish its purposes. See, Farmers & Mechanics Savings Bank v. Minnesota, 232 U. S. 516. No extraordinary gift of prophecy would seem to be required to forecast the ultimate fate of the Government's system of postal savings deposits if such discrimination against it by the states or other local taxing authorities be permissible.

The opinion of the Supreme Court in Madden v. Kentucky, 309 U. S. 83, which the state insists is authority sus- [fol. 21] taining the validity of such a variation in tax rates, even when affecting governmental agencies, deals only with the question under the due process, equal protection and privileges and immunities clauses of the Fourteenth Amendment. It has no application to or bearing upon the problem of inter-governmental taxation or the constitutional safeguards under which governmental functions are made secure from interference.

Immunity of the agencies and activities of the National Government from the effect of discriminatory state taxation is not dependent upon Congressional fiat but rests upon clearly implied constitutional sanction. We need not inquire whether postal savings deposits are embraced within the terms of section 3701 of the Revised Statutes (31 USCA § 742) for neither declaration of exemption by Congress nor the absence thereof would add to or detract from complete immunity existing by virtue of the necessary implications of the Constitution.

In Graves v. N. Y. ex rel. O'Keefe, supra, it is said:

"It is true that the silence of Congress when it has authority to speak, may sometimes give rise to an implication

as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the power of the taxing government."

Obviously no decision or consideration of the question whether postal savings deposits may be constitutionally subjected to a non-discriminatory state tax is called for, since no such tax is here involved.

[fol. 22] It follows from what has been said that the tax claim herein asserted on behalf of the State against the postal savings deposits held by the trustee is discriminatory on its face and hence should be and is adjudged unconstitutional and void. The action of the trustee in refusing to pay it is approved.

(S.) H. Church Ford, *Judge.*

March 19, 1941.

Hubert Meredith, Attorney General; H. Appleton Federa, Asst. Attorney General, Attorneys for Commissioner of Revenue of Commonwealth of Kentucky. Robert T. Caldwell, Ashland, Ky., Attorney for Trustee.

In United States District Court

Findings of Fact—Filed April 11, 1941

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the following finding of facts is made:

(1) H. Clyde Reeves is the duly authorized, qualified and acting Commissioner of Revenue of the Commonwealth of Kentucky, and as such has the duty of collecting taxes under Sections 4077-4091, Carroll's Kentucky Statutes, 1936 Edition, and Supplements thereto.

(2) The Kentucky Fuel Gas Corporation is a Delaware Corporation and was qualified to and did business in Ken-

tucky during the calendar year of 1938 under the trusteeship of Ben Williamson, Jr.

(3) Ben Williamson, Jr., was prior to January 1, 1939, and during the calendar year of 1938, appointed qualified and acting trustee of the Kentucky Fuel Gas Corporation [fol. 23] in bankruptcy action 991-B in this Court pursuant to a petition filed therein by creditors and stockholders in accordance with the reorganization provisions of 77-B of the Federal Bankruptcy Statutes and the Chandler Act.

(4) The Kentucky Fuel Gas Corporation under the trusteeship of Ben Williamson, Jr., during the calendar year of 1938, was a corporation coming under the provisions of Section 4077-4091, Carroll's Kentucky Statutes, 1936 Edition and Supplements thereto.

(5) The Kentucky Fuel Gas Corporation under the trusteeship of Ben Williamson, Jr., owned during the calendar year of 1938, $275,000.00 which it invested in Postal Savings Deposits.

(6) This property mentioned above was not part of the operating property of the company in exercising its franchise and hence was "non-operating intangible property."

(7) Under Section 4019 Baldwin's 1938 Kentucky Statute Supplement, all intangible property is assessed for state taxation at 50% per hundred dollars except that deposits in any bank, trust company, or combined bank and trust company, located in this State are taxed at 10c per hundred dollars and building and loan associations incorporated under the laws of this State, and making loans to members only are taxed at $1.00 per thousand dollars of their capital stock.

(8) The property mentioned in (5) was assessed by the Kentucky Tax Commission of the Department of Revenue of the Commonwealth of Kentucky and a tax thereon fixed by imposition of 50c per $100.00 at $1,570.00 and said assessment, if valid, became final June 1, 1939, when notice was received by the Kentucky Fuel Gas Corporation operating under the trusteeship of Ben Williamson, Jr.

(9) The trustee refused to pay the assessment, and on July 1, 1939, the assessment and tax, if valid, became delin-

[fol. 24] quent in accordance with Section 4091, Carroll's Kentucky Statutes, 1936 Edition.

(10) The Postal Savings System, as at present administered, is an integral part of the Government's fiscal agencies and is used as a substantial means of governmental financing operations. At the close of the fiscal year ending June 30, 1940, the total assets of the System, and the extent to which they had been used for governmental financing, as shown by the Postmaster General's report to the Federal Reserve Board, were as follows:

Balance to credit of depositors		$1,293,292,778.00
Total assets		1,336,612,432.25
Cash in depository banks		43,122,294.52
Total investments		1,224,332,188.70
U. S. Gov't	$1,077,990,298.27	
Guaranteed	146,341,890.43	
Reserve fund and receivables		69,157,949.03

The item of "Guaranteed" investments, of $146,341,-890.43, consisted of investments in the Federal Farm Loan Corporation's bonds, and Home Owners Loan Corporation bonds in which principal and interest are guaranteed.

(11) The imposition of a State tax of 50¢ per $100.00 of the principal amount of Postal Savings Certificates, which bear interest at the rate of 2% per annum, will adversely interfere with and retard the development and use of the Postal Savings deposit facilities, will injuriously affect the means employed by the Government to accomplish its purpose and will constitute a substantial burden upon the use of the System as a governmental financing agency.

Conclusions of Law

1. Postal Savings Certificates are "obligations of the [fol. 25] United States" exempted by Congress from State and other local taxation by the provisions of Section 3701 of the Revised Statutes of the United States, (31 USCA, Sec. 742).

2. The Postal Savings system is, as now constituted, a governmental financing agency and, as such, the postal savings certificates issued by it are exempt from taxation under the Constitution of the United States.

3. Taxation by the State of Postal Savings certificates, or the savings deposits represented thereby, at the rate of 50c per $100.00 of principal amount would constitute an unconstitutional discrimination against this governmental agency, and would unconstitutionally burden its operations.

(S.) H. Church Ford, *Judge.*

In United States District Court

Notice of Appeal—Filed April 25, 1941

Notice is hereby given that H. Clyde Reeves, Commissioner of Revenue of the Commonwealth of Kentucky, intervening petitioner in the above styled action hereby appeals to the Circuit Court of Appeals for the Sixth District from the final order entered on the 11th day of April, 1941, in this action.

Hubert Meredith, *Attorney General;* H. Appleton Federa, *Assistant Attorney General,* Attorneys for Intervening Petitioner.

[fol. 26] Cost Bond on Appeal for $250.00 filed April 25, 1941, omitted in printing.

[fol. 27] In United States District Court

Designation of Record—Filed April 25, 1941

To the Clerk of the United States District Court, Eastern District of Kentucky, at Lexington, Kentucky.

Please prepare and complete transcript of the record in this case to be filed in the office of the Circuit Court of Appeals of the United States for the Sixth Circuit under the appeal, taken, allowed and perfected to said Court including in your transcript the following pleadings and papers on file to wit:

(1) Intervening Petition of H. Clyde Reeves.

(2) Motion to Dismiss Intervening Petition.

(3) Stipulation of fact submitted by Kentucky Fuel Gas Corporation, plus exhibits thereto.

(4) Stipulation of facts submitted by H. Clyde Reeves Commissioner of Revenue of the Commonwealth of Kentucky.

(5) Findings of fact and conclusions of law.

(6) Order filed April 11, 1941.

(7) Memorandum opinion of the Court upon the issues raised by the Trustee's petition for advice.

(8) Notice of Appeal.

(9) Bond on Appeal.

(10) This Praecipe.

(11) Clerk's Certificate.

Said transcript to be prepared as required by law and rules for the Circuit Court of Appeals for the Sixth Circuit and file in the office of the Clerk of said Court at Cincin-
[fol. 28] nati, Ohio, not less than thirty days from the filing of the final order herein.

This 19th day of April, 1941.

Hubert Meredith, *Attorney General;* H. Appleton Federa, *Assistant Attorney General.*

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 29] In United States Circuit Court of Appeals for the Sixth Circuit

Cause Argued and Submitted—March 10, 1942

Before Simons, Allen and Martin, JJ.

This cause is argued by H. Appleton Federa for Appellant and by Robert T. Caldwell for Appellee and is submitted to the court.

In United States Circuit Court of Appeals

Decree—April 17, 1942

Appeal from the District Court of the United States for the Eastern District of Kentucky.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the [fol. 30] Eastern District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

[fol. 31] UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor
No. 991-B

H. CLYDE REEVES, Commissioner of Revenue of the Commonwealth of Kentucky, Intervening Petitioner, *Appellant*,

v.

BEN WILLIAMSON, JR., Trustee of the Kentucky Fuel Gas Corporation, *Appellee*

Appeal from the United States District Court, Eastern District of Kentucky

OPINION—Filed April 17, 1942

Before Simons, Allen and Martin, Circuit Judges

ALLEN, Circuit Judge:

This appeal arises out of the refusal of the appellee, trustee in bankruptcy of a corporation in reorganization, to pay a state tax upon funds of the debtor deposited pursuant to Title 11, U. S. C., Section 101a, in a postal savings depository of the United States situated in Kentucky, for which the appellee during 1938 held certificates of deposit in the amount of $275,000. The appellant is the Commissioner of Revenue for Kentucky, who was permitted to intervene in the bankruptcy proceedings for the purpose of asserting a claim for such taxes together with accrued interest and penalty thereon. Sections 4077 and 4019, Baldwin's Supplement to Carroll's Kentucky Statutes, prescribed a tax upon deposits in state banks and national banks of the state

at ten cents per one hundred dollars valuation, upon real [fol. 32] estate at five cents per one hundred dollars valuation, and upon all other property directed to be assessed at fifty cents for each one hundred dollars valuation. The postal savings deposits and the certificates representing them held by the appellee were considered to be within the latter classification and were assessed at the fifty cent rate.

The question is whether or not imposition of the tax constitutes a legitimate exercise of the state taxing power. The District Court held the assessment invalid and dismissed the petition, upon the ground that taxation of postal savings deposits constitutes a direct interference by the state with the exercise of federal power and upon the further ground that taxation at the rate imposed places a discriminatory burden on an activity of the federal government.

Postal savings depositories are established by the federal government in accordance with Title 39, U. S. C., Section 751 et seq. When a postal savings account is opened the depositor receives a pass-book, or, as in this case, a certificate of deposit, entitling him to withdraw the whole or any part of the fund deposited upon demand (Section 758). The funds received are required to be deposited in solvent banks in the city, town, village or locality in which the deposit is made, or if there is no qualified bank in that locality, in the bank most convenient thereto (Section 759). Withdrawals are required to be paid from the deposits in the state and in the community in which the deposit is made, so far as is practicable (Section 758). The faith of the United States is pledged to the payment of the deposits (Section 766), and this pledge is carried upon the face of the certificate of deposit involved herein. Under Section 759, "When, in the judgment of the President, the general welfare and interests of the United States so require, the board of trustees may invest all or any part of the postal savings funds, except the reserve fund of 5 per centum herein provided for, in bonds or other securities of the United States." The record shows that as of the close of the month of June, 1940, there was a balance due postal savings depositors in the United States of approximately $1,293,000,000, and that over 91 per cent of the postal savings funds has been invested in securities of the United States.

The creation and operation of the postal savings system are within the constitutional powers of the national gov-

ernment. Therefore, the activities carried on through the postal savings system are governmental functions which stand on a parity with all other activities carried on by that [fol. 33] government in respect to their constitutional immunity from state taxation. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 32; *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102.

The nature and practical importance of the functions of the system have been aptly summarized by the Court of Appeals of the District of Columbia in *Farley* v. *Albers*, 112 Fed. (2d) 401, certiorari denied, 311 U. S. 653:

"Taken as a whole, the system constitutes a part of both the postal and fiscal operations of the government. Profits are treated as postal revenue, and the fund is held in reserve for emergency use of the government and to facilitate government refinancing operations by the purchase of government bonds. It is safeguarded as other public moneys, and the obligation to the depositors is the pledge of the United States." (P. 402.)

Obviously postal savings deposits are not deposits either in a state bank or in a national bank situated in the state, and therefore they do not come within the ten cent tax upon such deposits imposed by the Kentucky statute. From every standpoint, however, so far as the depositor is concerned, the postal savings deposit is the equivalent of a local bank deposit. The depositor receives either a passbook or a postal savings certificate, his money is withdrawable on demand, and an obligation of the United States is created which is at least analogous to the relationship between a bank and its depositors. The state banks and national banks within the state compete with postal savings depositories for the money of the local depositors. The local feature of the transaction is emphasized by the statutory provisions cited, which require that money received for deposit, as here, at a local depository, shall be deposited in banks within the state and so far as possible within the community. If withdrawal of the deposit is sought, payment is to be made so far as possible from deposits within the state. The ten cent tax provision which applies to deposits in banks, however, does not cover postal savings, and the only provision of the Kentucky

statutes applicable to postal savings deposits is that which requires their assessment at fifty cents for each one hundred dollars (Section 4019). From a practical aspect, a tax upon these deposits which is five times the tax imposed upon deposits in all banks in Kentucky is plainly discrimi-[fol. 34] natory unless the holding in *Madden, Extr.* v. *Kentucky by Reeves, Commr.*, 309 U. S. 83, as contended by appellant, requires a different conclusion. That case held that a statute by which the state of Kentucky taxed deposits in banks outside the state at fifty cents per each one hundred dollars, is consistent with the due process, equal protection, and privileges and immunities clauses of the Fourteenth Amendment. The statutes there construed are the same as those involved here. The question of the application of the statute to postal savings deposits was not presented.

In the *Madden* case, the court, calling attention to the broad discretion as to classification possessed by a state legislature in the field of taxation, emphasized the difficulty in collecting the tax on deposits outside the state as compared with the tax on local deposits, and held the classification not invalid under the Fourteenth Amendment. The court declared that the classification may have been founded in the comparative difficulty and expense of tax collections upon bank deposits within and outside the state respectively. In a note (page 89) the court reviews the history of the legislation. It describes the high rate of taxation on intangibles in Kentucky prior to the constitutional amendment of 1916 which permitted classification, and states that this high rate of taxation led to widespread evasion of the tax in case of bank deposits by withdrawals for deposit outside the state. The purpose of the enactment of §§ 4077 and 4019, we therefore conclude, was to reach out-of-state deposits.

Here the deposits were made within Kentucky through the postal depository office at Ashland, Kentucky. Appellant claims, however, that the provision of Title 39, U. S. C., Section 762, that "No person connected with the Post Office Department shall disclose to any person other than the depositor the amount of any deposits unless directed so to do by the Postmaster General," places the instant case squarely within the rule of the *Madden* case, *supra*. However, the written personal property return required of resident taxpayers such as the insolvent debtor enables

the Kentucky tax authorities to ask the direct question as to the existence of postal savings deposits and certificates representing them, and makes it difficult for the taxpayer to conceal such deposits made within the state or the certificates therefor.

A study of the Kentucky statutes, Sections 4077 and 4019, *supra*, leads to the reasonable inference that the legislature of Kentucky, when it subjected deposits in "national banks within the state" as well as state banks to the ten cent tax provision, considered that it was cover-[fol. 35] ing the whole field of local bank deposits. It did not in Section 4019 specifically tax postal savings at the fifty cent rate, but applied the tax to "all other property" directed to be assessed for taxation as provided by law. We think this catchall provision, in view of the history detailed in the *Madden* case, *supra*, p. 89, was designed to reach bank deposits outside the state, and that the postal savings deposits within the state are included not through deliberate legislative intent, but simply because they fall within the terms of the provision. The holdings in *Commonwealth* v. *Madden's Extr.*, 265 Ky. 684, and *Madden's Extr.* v. *Commonwealth*, 277 Ky. 343, and in the United States Supreme Court case (309 U. S. 83) were directed to the taxation of bank deposits without the state and to no form of deposit within the state. We conclude that the *Madden* case does not decide that the fifty cent tax is nondiscriminatory and valid as between postal savings deposits made within Kentucky and all other deposits within the state taxed at the ten cent rate.

We think this conclusion is emphasized by the fact that neither the Kentucky holdings nor the Supreme Court decision considered the question of the effect of this state tax upon an instrumentality of the federal government which in addition to offering a safe depository for individual funds has also become an important federal financing agency. The imposition of such a prohibitive interference upon the activities of a federal institution was totally absent from the situation presented in those cases.

This discriminatory tax sought to be laid by the state upon United States postal savings deposits constitutes such a substantial burden upon an instrumentality and activity of the federal government as to be beyond the power of the state to impose. Postal savings institutions are a part of the structure of the federal government and

entitled under the constitution to the same immunity from interference by the state as other federal instrumentalities. *Graves* v. *New York ex rel. O'Keefe, supra; Pittman* v. *Home Owners' Loan Corp., supra; Federal Land Bank of St. Paul* v. *Bismarck Lumber Co., supra.* While in recent adjudications by the Supreme Court earlier doctrines of immunity of instrumentalities of the state and federal governments to taxation have been revised (Cf. *Helvering* v. *Gerhardt,* 304 U. S. 405), nevertheless the doctrine that in our dual system of government neither authority has power through taxation to cripple or destroy the operations of the other has not been modified.

[fol. 36] Recent Supreme Court cases repeatedly emphasize that the extension of the federal power to tax the income of state officials and vice versa, of state power to tax the income of federal officers, as well as the power to compel payment of taxes by persons who deal with governmental agencies, exists only in case the tax is non-discriminatory. *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 161; *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, 385; *Helvering* v. *Gerhardt, supra,* 420; *Graves* v. *New York ex rel. O'Keefe, supra,* 484, 485, 487. There has been no change in the rule that an implied immunity arises from undue interference when one governmental authority imposes its tax burdens on another. *Graves* v. *New York ex rel. O'Keefe, supra,* 481, 484. Obviously taxing postal savings certificates, and the deposits which they represent, five times as much as deposits in banks within the state, will cripple the extension, and within Kentucky possibly destroy the use of postal savings. If these deposits are to be taxed at such a rate in comparison with ordinary bank deposits throughout the forty-eight states, the use of postal savings depositories may be practically terminated. It follows that this tax cannot be upheld.

These conclusions make it unnecessary to decide whether these funds would be exempt from non-discriminatory taxation within the state if non-discriminatory tax provisions were enacted by the Kentucky legislature. We also deem it unnecessary to enter into a discussion of the codification of the various statutes and the extensive legislative history urged upon us by the appellant in connection with the question of the claimed immunity of these deposits from taxation under Title 31, U. S. C., Section 742, Section 3701 R. S. Since the tax is plainly discriminatory and

substantially burdens an instrumentality of the federal government, the order of the District Court, dismissing appellant's petition is correct and is affirmed.

CONCURRING OPINION

SIMONS, Circuit Judge (concurring). I concur in the result reached by the majority, but not on the ground that the Kentucky statute discriminates against postal savings deposits. I perceive no discrimination between such deposits and others of the same classification, and the classification has been held reasonable in the *Madden* case. The exaction is, however, an unconstitutional burden upon the financial activities of the Federal government, within the holding of the cases cited in the opinion.

[fol. 37] Petition for rehearing covering 6 pages, filed May 14, 1942, omitted from this print. It was denied, and nothing more by order of June 1, 1942.

[fol. 38] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—June 1, 1942

The petition for rehearing is denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR APPEAL—Filed July 7, 1942

Now comes the appellant and intervening petitioner, H. Clyde Reeves, individually and as Commissioner of Revenue of the Commonwealth of Kentucky, and feeling himself aggrieved by the final decree of the court entered herein the 17th day of April 1942, prays an appeal therefrom to the Supreme Court of the United States. The particulars wherein he considers the final decree erroneous are set forth in his assignment of errors on file and to which reference is made.

[fol. 39] Wherefor- the premises considered, your petitioner prays that an appeal in his behalf to the Supreme

Court of the United States for the correction of the errors complained of and herewith duly assigned, be allowed and granted; and that an order be had fixing the amount of bond and security to be given by this appellant and conditioned as the law directs, and he prays a reversal of said decree.

Hubert Meredith, Attorney General; M. B. Holifield and Jesse K. Lewis, Asst. Atty. General, Attorneys for Appellant.

In United States Circuit Court of Appeals

Assignments of Error—Filed July 7, 1942

Now comes the appellant, H. Clyde Reeves, individually and as Commissioner of Revenue of the Commonwealth of Kentucky and in connection with his Petition for Appeal, files the following assignments of error on which he will rely in his Appeal to Supreme Court of the United States from the final decision of the United States Circuit Court of Appeals, Sixth Circuit, entered on the 17th day of April, [fol. 40] 1942.

The Circuit Court of Appeals erred:

1. In affirming the judgment and order of the District Court, dismissing the intervening petition of appellant.

2. In not upholding and sustaining the validity of Section 4019, Baldwin's 1938 Supplement to Carroll's Kentucky Statutes as applied to Postal Savings Certificates held by appellee.

3. In holding and adjudging that said section 4019 Carroll's Kentucky Statutes, Baldwin's 1938 Supplement was invalid for reason that it violated the Constitution of the United States in that the holder and owner of Postal Savings Certificates, such as appellee, would be discriminated against by being required to pay the 50-cent rate of taxation whereas the holder and owner of certain other classes of deposit certificates would be required to only pay the 10-cent rate.

4. In the rendition of the final order and decree in this cause filed and entered the 17th day of April, 1942.

For which errors the appellant, H. Clyde Reeves, Commissioner of Revenue of the Commonwealth of Kentucky, prays that the said judgment of the Circuit Court of Appeals, Sixth Circuit, in the above-entitled cause, be reversed and a judgment entered in favor of the said appellant and [fol. 41] for costs.

Hubert Meredith, Attorney General; M. B. Holifield, Jesse K. Lewis, Attorneys for Appellant.

[fol. 42] In United States Circuit Court of Appeals

Order Allowing Appeal—Filed July 7, 1942

The petition of H. Clyde Reeves, Commissioner of Revenue of the Commonwealth of Kentucky, intervening petitioner in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United States from a judgment of the Circuit Court of Appeals, Sixth Circuit, having been filed herein accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rules 9 and 12 of the rules of the United States Supreme Court and the said papers having been presented to this court and the record in this cause having been considered;

It is hereby ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from a final decree of the United States Circuit Court of Appeals, Sixth Circuit, entered in this cause on the 17th day of April, 1942, and that the Clerk of the said Circuit Court of the [fols. 43-44] United States for the Sixth Circuit which, within 40 days from this day, make and transmit to the Supreme Court of the United States, under his hand and seal of the Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or a stipulation of the parties or their counsel herein, or in accordance with Rule 10 of the rules of the Supreme Court of the United States.

It is further ordered that the said appellant shall give a good and sufficient cost bond in the sum of $500.00, conditioned as required by law.

Done by the Court this Third day of July, 1942.

Elwood Hamilton, Circuit Judge.

Citation in usual form showing service on R. T. Caldwell, filed July 7, 1942, omitted in printing.

[fol. 45] In United States Circuit Court of Appeals

Stipulation Waiving Bond—Filed July 7, 1942

It is hereby stipulated by and between the attorneys for the respective parties that the bond on appeal be waived.

Hubert Meredith, Atty. General; M. B. Holifield, Jesse K. Lewis, Asst. Atty. General, Attorneys for Appellant; Robt. T. Caldwell, Porter M. Gray, Attorneys for Appellee.

[fol. 46] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 47] In Supreme Court of the United States

Statement of Points To Be Relied Upon and Designation of Parts of Record To Be Printed—Filed July 27, 1942

Now comes the appellant in the above entitled cause and states that the points upon which he intends to rely in this court in this case are as follows:

Point 1. That the United States Circuit Court of Appeals, Sixth Circuit, erred in refusing to reverse the order and judgment of the United States District Court, Eastern District of Kentucky.

Point 2. That the United States Circuit Court of Appeals, Sixth Circuit, erred in not upholding and sustaining the validity of Section 4019, Baldwin's 1938 Supplement to Carroll's Kentucky Statutes as same applies to taxation of $275,000 of Postal Savings Certificates held and owned by appellee.

Point 3. That the United States Circuit Court of Appeals, Sixth Circuit, erred in holding and adjudging that said Section 4019, Baldwin's 1939 Supplement, Carroll's [fol. 48] Kentucky Statutes, was invalid for reason that it violated the 14th Amendment to the Constitution of the

United States in that appellee as the holder and owner of $275,000.00 of Postal Savings Certificates, in being required to pay the 50¢ rate of tax thereon, would be discriminated against, because the holder and owner of certain other classes of deposit certificates would be required under said statute to only pay the 10¢ rate of tax.

Point 4. That the United States Circuit Court of Appeals, Sixth Circuit, erred in not holding that the Postal Savings Certificates held and owned by appellee were taxable, and erred in not holding that said Section 4019 of said Kentucky Statutes was valid under the Constitution of Kentucky and the Constitution of the United States as applied to Postal Savings Certificates owned by a Kentucky tax payer such as appellee.

Respectfully submitted, Hubert Meredith, Attorney General; M. B. Holifield, Assistant Attorney General; Jesse K. Lewis, Assistant Attorney General.

On this 21st day of July, 1942, personally appeared Jesse K. Lewis before me, subscriber, Ruth Nicholson, and makes oath that he delivered a true copy of the Statement of Points to be Relied Upon to Robert Caldwell, Attorney for appellee, by mailing same to said attorney at Ashland, Kentucky, on the 21st day of July, 1942.

Jesse K. Lewis.

Sworn and subscribed to 21st day of July, 1942. Ruth Nicholson, Notary Public. My commission expires the 22 day of Nov., 1943. (Seal.)

[fol. 49] APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Now comes the above named appellant and represents that the whole of the record, as filed, is necessary for the consideration of the case upon this appeal.

Hubert Meredith, Attorney General; M. B. Holifield, Jesse K. Lewis, Asst. Attorney General, Counsel for Appellant.

Service of the foregoing "Designation" is hereby acknowledged this 6 day of July, 1942.

Caldwell & Gray, Counsel for Appellee.

[fol. 50] [File endorsement omitted.]

[fol. 51] Endorsed on Cover: File No. 46,753. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 259. H. Clyde Reeves, Commissioner of Revenue of the Commonwealth of Kentucky, Appellant, vs. Ben Williamson, Jr., Trustee of the Kentucky Fuel Gas Corporation. Filed July 27, 1942. Term No. 259 O. T. 1942.

[fol. 33] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 259

H. CLYDE REEVES, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY, Petitioner,

vs.

BEN WILLIAMSON, JR., TRUSTEE OF THE KENTUCKY FUEL GAS CORPORATION

Order Extending Time Within Which to File Petition for Certiorari

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing petition for certiorari in the above entitled cause be, and the same is hereby, extended to and including October 1st, 1942.

Harlan T. Stone, Chief Justice of the United States.

Dated this 27th day of August, 1942.

(2)

Office - Supreme Court, U. S.
FILED
JUL 27 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 259

H. CLYDE REEVES, Commissioner of Revenue of the Commonwealth of Kentucky,

Appellant,

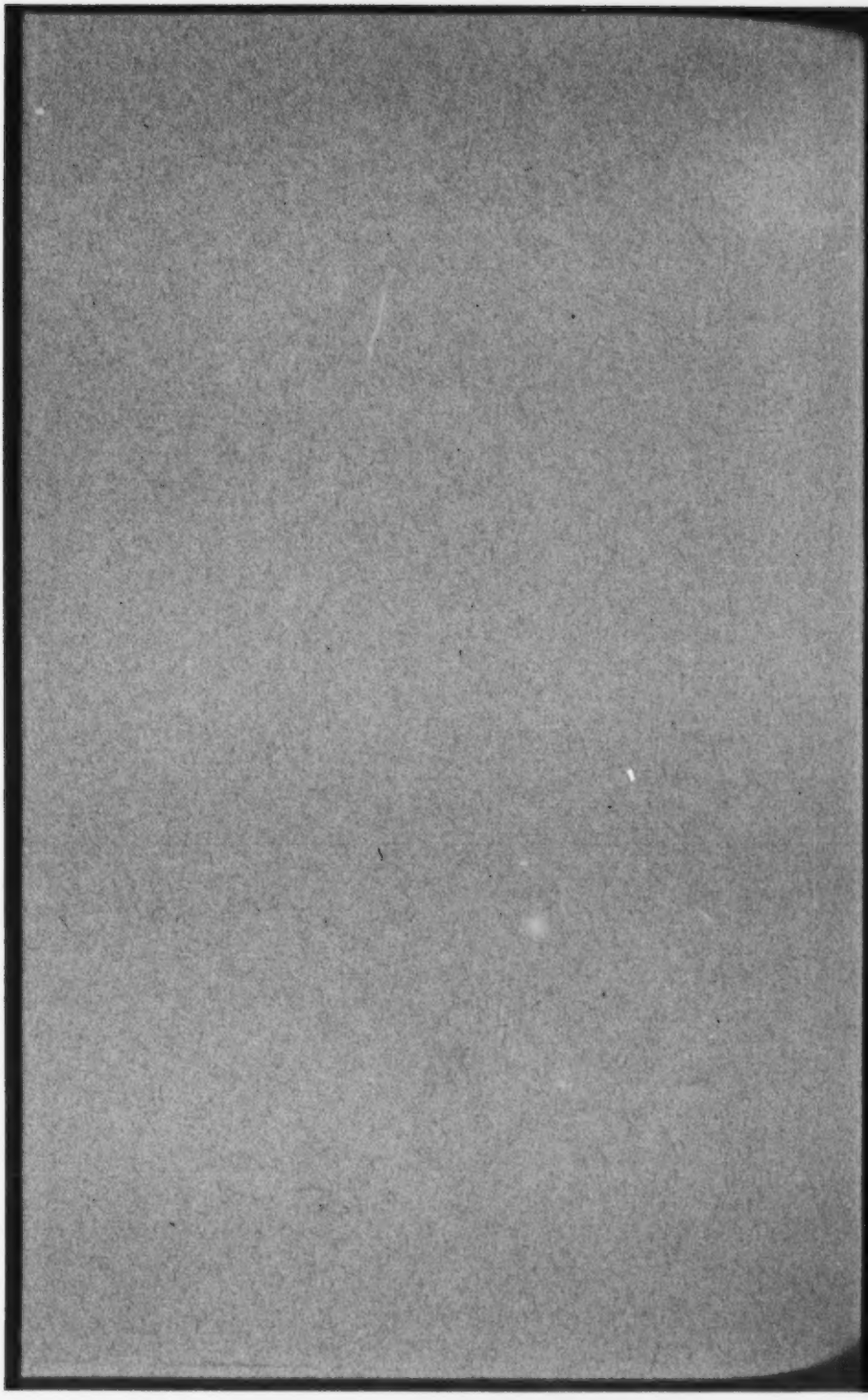
vs.

BEN WILLIAMSON, JR., Trustee of the Kentucky Fuel Gas Corporation.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT AS TO JURISDICTION.

Hubert Meredith,
Attorney General of Kentucky;
M. B. Holifield,
Jesse K. Lewis,
Assistant Attorneys General of Kentucky,
Counsel for Appellant.



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Statutes Cited.

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Judicial Code, Section 240, as amended by the Act of February 13, 1925, c. 299, Section 1, (43 Stat. 938 (28 U. S. C. A. 347b)	1, 4
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 259

H. CLYDE REEVES, Commissioner of Revenue of the Commonwealth of Kentucky,

Appellant,

vs.

BEN WILLIAMSON, JR., Trustee of the Kentucky Fuel Gas Corporation.

STATEMENT AS TO JURISDICTION.

(Filed July 7, 1942.)

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under section 240 of the Judicial Code as amended by the act of February 13, 1925, c. 299, Section 1 (43 stat. 938) (United States Code Ann., Title 28 Section 347(b)). The final decree of the United States Circuit Court of Appeals, Sixth Circuit, was entered April 17th, 1942. Application for appeal is herewith presented on the 3d day of July, 1942.

The Statute of the State of Kentucky, the validity of which is involved, is Chap. 148 of the 1934 Acts of the General Assembly of Kentucky, and which is section 4019, Carroll's Kentucky Statutes, Baldwin's 1938 Supplement. Said Statute reads:

> Annual taxes.—An annual ad valorem tax for state purposes of five (five) cents each one hundred dollars (one hundred dollars) of value of all real estate directed to be assessed for taxation, as provided by law and fifty cents upon each one hundred dollars (one hundred dollars) of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed; except a tax at the rate of one-tenth of one per cent (one-tenth of one per cent) shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, as now provided by law; and also including building and loan associations incorporated under the laws of this State, and making loans to members only, which association assessed except as otherwise provided by law in the manner and at the rate now set forth in Chapter fourteen of the Acts of the extraordinary session of the general assembly of nineteen seventeen (Sections four thousand nineteen a-six, four thousand nineteen a-seven, and four thousand nineteen a-eight).
>
> The aggregate amount of taxes realized under this Act shall be paid into the State Treasury and credited to the General Fund to be distributed and applied as may be provided by law.

The Kentucky Fuel Gas Corporation, a Delaware Corporation, did business in the Commonwealth of Kentucky during the calendar year 1938 operating under the trusteeship of Ben Williamson, Jr., who was duly appointed in bankruptcy action No. 991-B in the United States District Court for the Eastern District of Kentucky.

During the calendar year of 1938 the Corporation held and owned $275,000 in Postal Savings Deposits. Under the provisions of Section 4077, Kentucky Statutes, Baldwin's 1938 Supplement, all of the property of said taxpayer was assessed by the Kentucky Tax Commission. Under pertinent provisions of the Kentucky Statutes, it was the

duty of the appellant, H. Clyde Reeves as Commissioner of Revenue of the Commonwealth of Kentucky to collect all delinquent taxes owing the Commonwealth. The amount of taxes due on the $275,000 Postal Savings Certificates owned by the Kentucky Fuel Gas Corporation under the provisions of Section 4019, Kentucky Statutes, Baldwin's 1938 Supplement, was $1,375 with 10 per cent penalty as provided by Section *4091*, Kentucky Statutes.

The appellant, by his intervening petition, made claim for the amount of taxes, interest and penalties due to the Commonwealth of Kentucky in the bankruptcy proceedings in the district court, Eastern District of Kentucky, wherein he prayed judgment against Ben Williamson, Jr., as Trustee of the Kentucky Fuel Gas Corporation for the Commonwealth's claim. The District Court disallowed the appellant's claim for taxes based on the provisions of section 4019 Kentucky Statutes, Baldwin's 1938 Supplement:

> 1. for reason that Postal Savings Certificates are exempt from state and other local taxes by the provisions of Section 3701 of the revised statutes of the United States (31 U. S. C. A. Section 742);
>
> 2. for reason that the Postal Savings Certificates are exempt from taxation under the Constitution of the United States in that the Postal Savings System is a governmental financing agent; and
>
> 3. for reason that the 50 per cent rate per hundred dollars provided for in Section 4019, Kentucky Statutes, Baldwin's 1938 Supplement, constituted an unconstitutional discrimination against a governmental agency by which an unconstitutional burden was placed on its operations.

On appeal to the Circuit Court of Appeals, Sixth Circuit, that court held that Section 4019 Kentucky Statutes, Baldwin's 1938 Supplement, discriminated against the Postal

Savings Deposits and that therefore and by reason thereof said Kentucky's taxing statute was invalid as applied to Postal Savings Certificates.

The facts alleged, stipulated and admitted in the record leave no question for determination other than the question as to whether or not section 4019, Carroll's Kentucky Statutes, Baldwin's 1938 Supplement, is invalid when applied to the taxation of Postal Savings Certificates owned by a Kentucky taxpayer at the rate therein provided.

The appeal prayed for is to the Supreme Court of the United States from the final decree affirming the judgment of a District Court in dismissing the appellant's intervening petition, and is provided for by judicial code section 240 as amended by the Act of February 13, 1925, c. 299, Section 1 (43 stat. 938) (United States Code Ann., Title 28 Section 347(b)).

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are:

New York v. *Latrobe,* 279 U. S. 421, 49 S. Ct. 377, 73 L. Ed. 776, 65 A. L. R. 1341;

Mayor, etc., of City of Natchez v. *McNeeley,* 275 U. S. 502, 48 S. Ct. 156, 72 L. Ed. 394;

City of Richmond v. *Deans,* 281 U. S. 704, 50 S. Ct. 407, 74 L. Ed. 1128;

Healy v. *Ratta,* 292 U. S. 263, 54 S. Ct. 700, 78 L. Ed. 1248.

Compare *Stratton* v. *St. Louis Southwestern R. Co.,* 282 U. S. 10, 51 S. Ct. 8, 75 L. Ed. 135.

Respectfully submitted,

HUBERT MEREDITH,
Attorney General of Kentucky;
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APPENDIX "A".

UNITED STATES CIRCUIT COURT OF APPEALS,
SIXTH CIRCUIT.

No. 8973.

In the Matter of KENTUCKY FUEL GAS CORPORATION, Debtor
No. 991-B.

H. CLYDE REEVES, Commissioner of Revenue of the Commonwealth of Kentucky, Intervening Petitioner, *Appellant*,

v.

BEN WILLIAMSON, JR., Trustee of the Kentucky Fuel Gas Corporation, *Appellee*.

Appeal from the United States District Court, Eastern District of Kentucky.

Decided April 17, 1942.

Before Simons, Allen and Martin, Circuit Judges.

ALLEN, Circuit Judge:

This appeal arises out of the refusal of the appellee, trustee in bankruptcy of a corporation in reorganization, to pay a state tax upon funds of the debtor deposited pursuant to Title 11, U. S. C., Section 101a, in a postal savings depository of the United States situated in Kentucky, for which the appellee during 1938 held certificates of deposit in the amount of $275,000. The appellant is the Commissioner of Revenue for Kentucky, who was permitted to intervene in the bankrutpcy proceedings for the purpose of asserting a claim for such taxes together with accrued interest and penalty thereon. Sections 4077 and 4019, Baldwin's Supplement to Carroll's Kentucky Statutes, prescribe a tax upon deposits in state banks and national banks of the state at ten cents per one hundred dollars valuation, upon real estate at five cents per one hundred dollars valuation, and upon all other property directed to be assessed at fifty

cents for each one hundred dollars valuation. The postal savings deposits and the certificates representing them held by the appellee were considered to be within the latter classification and were assessed at the fifty cent rate.

The question is whether or not imposition of the tax constitutes a legitimate exercise of the state taxing power. The District Court held the assessment invalid and dismissed the petition, upon the ground that taxation of postal savings deposits constitutes a direct interference by the state with the exercise of federal power and upon the further ground that taxation at the rate imposed places a discriminatory burden on an activity of the federal government.

Postal savings depositories are established by the federal government in accordance with Title 39, U. S. C., Section 751 et seq. When a postal savings account is opened the depositor receives a pass-book, or, as in this case, a certificate of deposit, entitling him to withdraw the whole or any part of the fund deposited upon demand (Section 758). The funds received are required to be deposited in solvent banks in the city, town, village or locality in which the deposit is made, or if there is no qualified bank in that locality, in the bank most convenient thereto (Section 759). Withdrawals are required to be paid from the deposits in the state and in the community in which the deposit is made, so far as is practicable (Section 758). The faith of the United States is pledged to the payment of the deposits (Section 766), and this pledge is carried upon the face of the certificate of deposit involved herein. Under Section 759, "When, in the judgment of the President, the general welfare and interests of the United States so require, the board of trustees may invest all or any part of the postal savings funds, except the reserve fund of 5 per centum herein provided for, in bonds or other securities of the United States." The record shows that as of the close of the month of June, 1940, there was a balance due postal savings depositors in the United States of approximately $1,293,000,000, and that over 91 per cent of the postal savings funds has been invested in securities of the United States.

The creation and operation of the postal savings system are within the constitutional powers of the national govern-

ment. Therefore, the activities carried on through the postal savings system are governmental functions which stand on a parity with all other activities carried on by that government in respect to their constitutional immunity from state taxation. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 32; *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102.

The nature and practical importance of the functions of the system have been aptly summarized by the Court of Appeals of the District of Columbia in *Farley* v. *Albers*, 112 Fed. (2d) 401, certiorari denied, 311 U. S. 653:

"Taken as a whole, the system constitutes a part of both the postal and fiscal operations of the government. Profits are treated as postal revenue, and the fund is held in reserve for emergency use of the government and to facilitate government refinancing operations by the purchase of government bonds. It is safeguarded as other public moneys, and the obligation to the depositors is the pledge of the United States." (P. 402.)

Obviously postal savings deposits are not deposits either in a state bank or in a national bank situated in the state, and therefore they do not come within the ten cent tax upon such deposits imposed by the Kentucky statute. From every standpoint, however, so far as the depositor is concerned, the postal savings deposit is the equivalent of a local bank deposit. The depositor receives either a pass-book or a postal savings certificate, his money is withdrawable on demand, and an obligation of the United States is created which is at least analogous to the relationship between a bank and its depositors. The state banks and national banks within the state compete with postal savings depositories for the money of the local depositors. The local feature of the transaction is emphasized by the statutory provisions cited, which require that money received for deposit, as here, at a local depository, shall be deposited in banks within the state and so far as possible within the community. If withdrawal of the deposit is sought, payment is to be made so far as possible from deposits within the state. The ten cent tax provision which applies to deposits in banks,

however, does not cover postal savings, and the only provision of the Kentucky statutes applicable to postal savings deposits is that which requires their assessment at fifty cents for each one hundred dollars (Section 4019). From a practical aspect, a tax upon these deposits which is five times the tax imposed upon deposits in all banks in Kentucky is plainly discriminatory unless the holding in *Madden, Extr.* v. *Kentucky by Reeves, Commr.*, 309 U. S. 83, as contended by appellant, requires a different conclusion. That case held that a statute by which the state of Kentucky taxed deposits in banks outside the state at fifty cents per each one hundred dollars, is consistent with the due process, equal protection, and privileges and immunities clauses of the Fourteenth Amendment. The statutes there construed are the same as those involved here. The question of the application of the statute to postal savings deposits was not presented.

In the *Madden* case, the court, calling attention to the broad discretion as to classification possessed by a state legislature in the field of taxation, emphasized the difficulty in collecting the tax on deposits outside the state as compared with the tax on local deposits, and held the classification not invalid under the Fourteenth Amendment. The court declared that the classification may have been founded in the comparative difficulty and expense of tax collections upon bank deposits within and outside the state respectively. In a note (page 89) the court reviews the history of the legislation. It describes the high rate of taxation on intangibles in Kentucky prior to the constitutional amendment of 1916 which permitted classification, and states that this high rate of taxation led to widespread evasion of the tax in case of bank deposits by withdrawals for deposit outside the state. The purpose of the enactment of §§ 4077 and 4019, we therefore conclude, was to reach out-of-state deposits.

Here the deposits were made within Kentucky through the postal depository office at Ashland, Kentucky. Appellant claims, however, that the provision of Title 39, U. S. C., Section 762, that "No person connected with the Post Office Department shall disclose to any person other than the de-

positor the amount of any deposits unless directed so to do by the Postmaster General," places the instant case squarely within the rule of the *Madden* case, *supra*. However, the written personal property return required of resident taxpayers such as the insolvent debtor enables the Kentucky tax authorities to ask the direct question as to the existence of postal savings deposits and certificates representing them, and makes it difficult for the taxpayers to conceal such deposits made within the state or the certificates therefor.

A study of the Kentucky statutes, Sections 4077 and 4019, *supra*, leads to the reasonable inference that the legislature of Kentucky, when it subjected deposits in "national banks within the state" as well as state banks to the ten cent tax provision, considered that it was covering the whole field of local bank deposits. It did not in Section 4019 specifically tax postal savings at the fifty cent rate, but applied the tax to "all other property" directed to be assessed for taxation as provided by law. We think this catchall provision, in view of the history detailed in the *Madden* case, *supra*, p. 89, was designed to reach bank deposits outside the state, and that the postal savings deposits within the state are included not through deliberate legislative intent, but simply because they fall within the terms of the provision. The holdings in *Commonwealth* v. *Madden's Extr.*, 265 Ky. 684, and *Madden's Extr.* v. *Commonwealth*, 277 Ky. 343, and in the United States Supreme Court case (309 U. S. 83) were directed to the taxation of bank deposits without the state and to no form of deposit within the state. We conclude that the *Madden* case does not decide that the fifty cent tax is non-discriminatory and valid as between postal savings deposits made within Kentucky and all other deposits within the state taxed at the ten cent rate.

We think this conclusion is emphasized by the fact that neither the Kentucky holdings nor the Supreme Court decision considered the question of the effect of this state tax upon an instrumentality of the federal government which in addition to offering a safe depository for individual funds has also become an important federal financing

agency. The imposition of such a prohibitive interference upon the activities of a federal institution was totally absent from the situation presented in those cases.

This discriminatory tax sought to be laid by the state upon United States postal savings deposits constitutes such a substantial burden upon an instrumentality and activity of the federal government as to be beyond the power of the state to impose. Postal savings institutions are a part of the structure of the federal government and entitled under the constitution to the same immunity from interference by the state as other federal instrumentalities. *Graves* v. *New York ex rel. O'Keefe, supra; Pittman* v. *Home Owners' Loan Corp., supra; Federal Land Bank of St. Paul* v. *Bismarck Lumber Co., supra.* While in recent adjudications by the Supreme Court earlier doctrines of immunity of instrumentalities of the state and federal governments to taxation have been revised. Cf. *Helvering* v. *Gerhardt*, 304 U. S. 405), nevertheless the doctrine that in our dual system of government neither authority has power through taxation to cripple or destroy the operations of the other has not been modified.

Recent Supreme Court cases repeatedly emphasize that the extension of the federal power to tax the income of state officials and vice versa, of state power to tax the income of federal officers, as well as the power to compel payment of taxes by persons who deal with governmental agencies, exists only in case the tax is non-discriminatory. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 161; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 385; *Helvering* v. *Gerhardt, supra*, 420; *Graves* v. *New York ex rel. O'Keefe, supra*, 484, 485, 487. There has been no change in the rule that an implied immunity arises from undue interference when one governmental authority imposes its tax burdens on another. *Graves* v. *New York ex rel. O'Keefe, supra*, 481, 484. Obviously taxing postal savings certificates, and the deposits which they represent, five times as much as deposits in banks within the state, will cripple the extension, and within Kentucky possibly destroy the use of postal savings. If these deposits are to be taxed at such a rate in comparison with ordinary

bank deposits throughout the forty-eight states, the use of postal savings depositories may be practically terminated. It follows that this tax cannot be upheld.

These conclusions make it unnecessary to decide whether these funds would be exempt from non-discriminatory taxation within the state if non-discriminatory tax provisions were enacted by the Kentucky legislature. We also deem it unnecessary to enter into a discussion of the codification of the various statutes and the extensive legislative history urged upon us by the appellant in connection with the question of the claimed immunity of these deposits from taxation under Title 31, U. S. C., Section 742, Section 3701 R. S. Since the tax is plainly discriminatory and substantially burdens an instrumentality of the federal government, the order of the District Court dismissing appellant's petition is correct and is affirmed.

SIMONS, Circuit Judge (concurring). I concur in the result reached by the majority, but not on the ground that the Kentucky statute discriminates against postal savings deposits. I perceive no discrimination between such deposits and others of the same classification, and the classification has been held reasonable in the *Madden* case. The exaction is, however, an unconstitutional burden upon the financial activities of the Federal government, within the holding of the cases cited in the opinion.

(3)

FILED
SEP 25 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942

No. 259

IN THE MATTER OF KENTUCKY FUEL GAS CORPORATION

Debtor No. 991-B

H. CLYDE REEVES, Commissioner of Revenue of the Commonwealth of Kentucky, Intervening Petitioner . . . Petitioner

vs.

BEN WILLIAMSON, Jr., Trustee of the Kentucky Fuel Gas Corporation.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Sixth Circuit, and Brief in Support Thereof.

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 259

IN THE MATTER OF KENTUCKY FUEL GAS CORPORATION

Debtor No. 991-B

H. CLYDE REEVES, Commissioner of Revenue of the Commonwealth of Kentucky, Intervening Petitioner ..... *Petitioner.*

Vs.

BEN WILLIAMSON, JR., Trustee of the Kentucky Fuel Gas Corporation.

Petition for Writ of Certiorari to the Circuit Court of Appeals of the United States, Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Summary of Statement of the Matter Involved.

The Kentucky Fuel Gas Corporation is a Delaware corporation. It did business in Kentucky during the cal-

endar year of 1938 operating under the trusteeship of Ben Williamson, Jr., who was duly appointed in bankruptcy action No. 991-B in the United States District Court for the Eastern District of Kentucky.

Petitioner, H. Clyde Reeves, is the Commissioner of Revenue of the Department of Revenue of the Commonwealth of Kentucky, and as such has the duty of collecting all delinquent taxes owing the Commonwealth.

The Kentucky Tax Commission is the assessing body of the Department of Revenue, and did assess the Kentucky Fuel Gas Corporation on the property held as of December 31, 1938, in accordance with Sec. 4077 Baldwin's 1938 Kentucky Statutes Supplement, and Sec. 4078a Carroll's Kentucky Statutes, 1936 edition. (Appendix "A")

During 1938 this corporation held $275,000.00 invested in Postal Savings certificates. (Title 39, Sec. 759, U. S. C.) This property was assessed at fifty cents per one hundred dollars' value, in accordance with Sec. 4019 Baldwin's 1938 Supplement to Carroll's Kentucky Statutes. (Appendix "B").

The tax on this $275,000.00 amounted to $1,375.00, and said assessment became final on June 1, 1939, when notice thereof was received by said Corporation under the provisions of Sec. 4091 Carroll's Kentucky Statutes, 1936 edition (Appendix "C"). And thirty days after notice of amount of said tax was given by the Department of Revenue (on July 1, 1939) said corporation must be considered delinquent, and the penalty provided for by said Statute amounting to $137.50 attached. (Appendix "C")

On October 18, 1939, after the trustee refused to pay this tax, the petitioner filed with the trustee a verified proof of claim asserting the liability of the debtor for taxes, penalty and interest. The trustee filed in the Federal District Court of the Eastern District of Kentucky a petition for advice. The Court gave the opinion found in the record, (Pages 11 to 16) and reported in 37 Federal Supplement 625.

On April 11, 1941, petitioner, H. Clyde Reeves, filed an intervening petition in this bankruptcy action (Tr. Rec. P. 1). The trustee made a motion to dismiss on the ground that the petition did not state facts sufficient to constitute a cause of action (Tr. Rec. P. 5). A stipulation of facts was placed in the record, (Tr. Rec. P. 6).

On April 11, 1941, an order was entered denying the tax claim, ruling the assessment invalid and dismissing the petition. (Tr. of Rec. P. 10). From this order the petitioner appealed to the Circuit Court of Appeals, Sixth Circuit, which Court affirmed the judgment of the District Court, (Tr. Rec. P. 21).

The sole question involved in this proceeding is the liability, under the provisions of Sec. 4019 Carroll's Kentucky Statutes, Baldwin's 1938 Supplement, of Kentucky taxpayers for the intangible property tax on Postal Savings certificates owned by them.

II.

Jurisdiction of the Supreme Court.

The jurisdiction of the Supreme Court of the United States is invoked under Sec. 240 of the Judicial Code as amended by the Act of Feb. 13, 1925, C. 299, Sec. 1 (43 Stat. 938), (U. S. Code Ann., Title 28, Sec. 437 (a)).

III.

Question Presented.

Whether the Commonwealth of Kentucky may lay an intangible property tax on Postal Savings certificates in the hands of Kentucky taxpayers at the general rate charged on intangible property.

IV.

Reasons for Granting the Writ.

This is a test case upon the decision of which the taxability of Postal Savings certificates owned by Kentucky taxpayers will depend.

The Circuit Court of Appeals and the District Court held invalid Sec. 4019 Kentucky Statutes, Baldwin's 1938 Supplement, and adjudged that the taxation of Postal Savings certificates under the provisions of said Statute would be discriminatory and would interfere with the operations of the Federal Government.

This was a decision on an important question of Federal law which has not been heretofore considered by this Court, and the importance of it is such that it should be settled. This is emphasized by the fact that the Supreme Court of Indiana, in the case of *Lutz* v. *Arnold,* 193 N. E., 840, has held under a similar taxing statute that Postal Savings certificates were taxable in that State.

Furthermore, the opinion of the Circuit Court of Appeals in this case is in apparent conflict with this Court's opinion in the case of *Madden* v. *Kentucky,* 309 U. S. 83, 84 Law Ed. 590, with respect to the classification of intangible property for the purposes of state taxation. For this added reason, therefore, this Court should allow this writ and reverse the decision of the Circuit Court of Appeals.

Prayer for Writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record, and all proceedings in the case, number and title on its docket, "No. 8973, In the Matter of Kentucky Fuel Gas Corporation Debtor No. 991-B, H. Clyde Reeves, Commissioner of Revenue of the Commonwealth of Kentucky, Intervening Petitioner, Appellant v. Ben Williamson, Jr., Trustee of the Kentucky Fuel Gas Corporation, Appellee," and that said judgment of the said United States Circuit Court of Appeals for the Sixth Circuit may be reviewed by this Honorable Court, and

that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

H. Clyde Reeves,
Commissioner of Revenue for the Comlth. of Kentucky, Intervening Petitioner, Petitioner.

Hubert Meredith,
Attorney General of Kentucky.

Jesse K. Lewis,
Assistant Attorney General,

Counsel for Petitioner.

Appendix "A."

Section 4077, Baldwin's 1938 Kentucky Statutes Supplement.

"Every railway company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telephone company, telegraph company, press dispatch company, bus line company, common carrier trucking company, air transport company, palace car company, dining car company, sleeping car company, chair car company, tank car company, coal car company, pipe line company, and every other like company or business performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, wherein its franchise may be exercised.

"The property of such taxpayers shall be classified as operating tangible, franchise, non-operating tangible and non-operating intangible.

"Non-operating intangibles within the taxing jurisdiction of the Commonwealth shall be taxable for State purposes only at the same rate as the intangible property of other taxpayers not performing public services, and tangible property whether operating or non-operating shall be subject to State and local taxes at the same rate as the tangible property of other taxpayers not performing public services.

"The Department of Revenue shall have sole power to value and assess all of the property, including the franchise, of every corporation, company, association, partnership, or person performing any public service, including those enumerated above and all others to whom this section may apply, whether or not such operating or non-operating tangible or non-operating intangible, or franchise values have hereto-

fore been assessed by said Department, and shall apportion such assessments of franchise as provided by section 4081 of the Statutes and shall certify tangible property to the counties, cities, towns and taxing districts where said property is situated. Provided, however, that in the case of a taxpayer whose business is predominantly non-franchise and the franchise or public service business in which he is engaged is merely incidental to his principal business, the Department shall in the exercise of its judgment and discretion, determine from evidence which it may have or obtain, what portion of the capital and property is devoted to the public service business subject to assessment by the Department under this Act, and shall require the remainder of the property not so engaged to be assessed by the local taxing authorities."

And Section 4078a Carroll's Kentucky Statutes, 1936 Edition:

"That the annual report or statement of every railway company or railway corporation, telephone, telegraph, express company or other public utility company now required under the provisions of the Kentucky Statutes to be made and delivered to the auditor of public accounts, tax commission or railroad commission, between the 30th day of June and the 1st day of October, hereafter shall be made and delivered by every such company or corporation to the auditor of public accounts, the tax commission and the railroad commission between the 31st day of December and the 31st day of March following, and the information therein furnished as called for by the statutory provisions aforesaid shall cover the period of twelve months ending the 31st day of December, instead of the 30th day of June, as heretofore required; provided, however, the aforesaid state departments are hereby authorized and directed to change the date of the aforesaid reports to conform to any change in date established by federal regulations."

Appendix "B."

Section 4019 Baldwin's 1938 Supplement to Carroll's Kentucky Statutes:

"An annual ad valorem tax for state purposes of five (five) cents each one hundred dollars (one hundred dollars) of value of all real estate directed to be assessed for taxation, as provided by law and fifty cents upon each one hundred dollars (one hundred dollars) of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed; except a tax at the rate of one-tenth of one per cent (one-tenth of one per cent) shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, as now provided by law; and also including building and loan associations incorporated under the laws of this State, and making loans to members only, which association shall be assessed except as otherwise provided by law in the manner and at the rate now set forth in Chapter fourteen of the Acts of the extraordinary session of the general assembly of nineteen seventeen (Sections four thousand nineteen a-six, four thousand nineteen a-seven, and four thousand nineteen a-eight).

"The aggregate amount of taxes realized under this Act shall be paid into the State Treasury and credited to the General Fund to be distributed and applied as may be provided by law."

Appendix "C."

Sec. 4091 Carroll's Kentucky Statutes, 1936 edition, as follows:

"All the state taxes assessed against any corporation, company or association, under this article, shall be due and payable thirty days after notice of the same has been given said corporation, company or association by the auditor; and all county, municipal, school and other taxes shall be due and payable thirty days after notice of the amount of said tax is given by the officer whose duty it is to collect the same; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent (10%) on the amount of the tax shall attach, and thereaftar such tax shall bear interest at the rate of ten per cent (10%) per annum. Any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor and, on conviction, shall be fined fifty dollars ($50.00) for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction. It shall be the duty of the county clerk to furnish to the auditor of public accounts, on blanks provided by the auditor, a statement of the assessed value of the tangible property of all corporations, companies or associations paying a franchise or other tax under this act.

"Any county clerk failing to comply with the requirements of this act shall be guilty of a misdemeanor and, on conviction, shall be fined not less than ten nor more than twenty-five dollars."

Supreme Court of the United States

OCTOBER TERM, 1942

No. 259

IN THE MATTER OF KENTUCKY FUEL GAS CORPORATION

Debtor No. 991-B

H. Clyde Reeves, Commissioner of Revenue of the Commonwealth of Kentucky, Intervening Petitioner ..... *Petitioner.*

Vs.

Ben Williamson, Jr., Trustee of the Kentucky Fuel Gas Corporation.

BRIEF FOR PETITIONER FOR WRIT OF CERTIORARI.

The Decisions of the Courts Below.

The opinion of the District Court is reported in 37 Federal Supplement, 625, and the opinion of the Circuit Court of Appeals, Sixth Circuit, is reported in 127 Federal, 2nd, 657.

Jurisdiction.

The statement of the grounds on which jurisdiction of this Court is invoked is set out in the petition. The Statute of Kentucky, the validity of which is involved, and other pertinent statutes are incorporated in the Appendix to the petition. There is also contained in the petition a concise statement of the material facts to be considered on the question presented.

The final decree of the United States Circuit Court of Appeals was entered on April 17, 1942. Petition for rehearing was subsequently filed and overruled on June 1, 1942. Application for appeal was presented on the third day of July, 1942.

Specification of Errors.

The main points which your petitioner intends to rely upon for a reversal of the decree of the United States Circuit Court of Appeals are as follows:

1. The classification of Postal Savings certificates with other intangibles as provided for by Sec. 4019, Carroll's Kentucky Statutes, Baldwin's 1938 Supplement, is not unconstitutional or discriminatory, and by reason thereof the Circuit Court of Appeals erred in holding that Postal Savings certificates could not be taxed at the rate provided for in said Statute.

2. Sec. 4019 Kentucky Statutes, Baldwin's 1938 Supplement, is valid as applied to Postal Savings certificates held by Kentucky taxpayers.

3. The Postal Savings Depositories Act is not a governmental borrowing agency, and a state statute taxing Postal Savings certificates is not an interference with any governmental function, and does not impose any burden upon the Federal Government.

4. The Circuit Court of Appeals erred in affirming the judgment and order of the District Court dismissing the petitioner's intervening petition.

Summary of Argument.

1. The classification of Postal Savings Certificates with other intangible property at the fifty (50c) cent rate per one hundred ($100.00) dollars, under the provisions of Sec. 4019 Kentucky Statutes, Baldwin's 1938 Supplement, does not violate the due process clause of the Fourteenth Amendment to the Federal Constitution, since the classification is based upon "the difference in the tax collections", or because of "the difference in difficulties and expenses of tax collection."

2. When Congress enacted the Postal Savings Depositories Act, it had no intention of creating a governmental borrowing agency, and since the "intention of the law makers is the law", the Postal Savings system can not be converted into a governmental borrowing agency by either administrative practice or by judicial construction.

3. The money which the tax-payers of Kentucky turn over to the Postoffice Department for deposit remains the property of the taxpayers which the Postmaster merely holds as trustee, and by reason thereof the government does not borrow this money or hold it to be used by it for any governmental purpose. This money, or the certificates representing it, is therefore subject to a non-discriminatory state tax.

4. When it enacted the Postal Savings Depositories Act, Congress had under consideration and acted on the question of tax exemptions. By exempting from taxation Postal Savings bonds and failing to exempt Postal Savings certificates, Congress clearly evinced a purpose to prohibit the taxation of one and to permit the taxation of the other. The taxation of the latter would not cast any burden upon or interfere with the operations of the federal government.

ARGUMENT.

I.

The Tax on Postal Savings Deposits at Fifty Cents Per Hundred Dollars Valuation Is Not Discriminatory.

The Circuit Court of Appeals in the majority opinion said:

> "Obviously taxing Postal Savings certificates and the deposits which they represent five times as much as deposits in banks within the State will cripple the extension, and within Kentucky, possibly destroy the use of Postal Savings. * * * It follows that this tax can not be upheld."

From the opinions of both the District Court and the Circuit Court of Appeals it would appear that this case was considered as a controversy exclusively between the taxing authorities of the Commonwealth of Kentucky and the United States. It is submitted, however, that the sole question involved is whether or not the Commonwealth of Kentucky may lay an intangible property tax on Postal Savings certificates in the hands of the Kentucky taxpayer, and at the rate charged on intangible property generally, without violating the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

In other words, the interests of the United States are not involved, but the validity of Sec. 4019 Kentucky Statutes is involved, and this constitutional question is thereby presented:—Is the Kentucky Statute taxing intangibles invalid as discriminating against the holder of Postal Savings certificates by requiring him to pay the general intangible rate of fifty cents per one hundred dollars whereas the holder of deposit certificates in state and national banks is only required to pay the rate of ten cents per one hundred dollars?

Under the provisions of the Kentucky Constitution all property not specifically exempted is required to be taxed.

> "* * * and all laws exempting or commuting property from taxation other than the property above mentioned shall be void." (Sec. 170 Ky. Constitution)
>
> "All property not exempt from taxation by this Constitution shall be assessed for taxation at its fair cash value * * *." (Sec. 172 Kentucky Constitution)
>
> "Property may be classified for purposes of taxation." (Section 172 Ky. Constitution).

Therefore, all intangible property (which must include postal savings certificates) is, and always has been, subject to taxation in Kentucky. Sec. 4020 Ky. Stat.; Land v. Ky. Joint Stock Land Bank, 279 Ky., 645, 131 S. W. (2d) 838; Commonwealth v. Madden's Executor, 265 Ky. 684; Madden v. Kentucky, 309 U. S. 803, 84 L. Ed. 590.

Although Postal Savings deposits are somewhat in the nature of bank deposits, they are not within the same classification as bank deposits for taxation purposes, for several reasons, some of which are immediately apparent.

It has been pointed out both by this Court and by the Kentucky Court of Appeals that bank deposits are taxed at their source, as required by Kentucky law. The banks pay the taxes and charge same to the separate accounts of their depositors. Kentucky could not require the Postoffice department to pay the tax on Postal Savings deposits and charge same to the accounts of the depositors, nor could the Kentucky legislature require a Postmaster or the Postmaster General to report or disclose to the taxing authorities of the Commonwealth of Kentucky the names of depositors and the amount of each deposit. The Postal Savings law (Sec. 762 Title 39 U. S. C.) prohibits a Postmaster from disclosing the names of depositors and the amount of their deposits without the consent of the Postmaster General.

In fact it is easier for the taxing authorities of Kentucky to discover and assess stocks and bonds held in

Kentucky corporations, and corporations doing business in Kentucky, than it is for them to discover and assess Postal Savings certificates. In Sec. 4019a-10 Kentucky Statutes, it is provided that such corporations shall furnish to the State Tax Commission each year the names and addresses of residents of Kentucky who hold their shares of stocks and outstanding bonds on the date of assessment, July first.

It is therefore obvious that a Kentucky resident owning Postal Savings certificates comes within the same classification for purposes of taxation as does the Kentucky resident having money on deposit in a non-resident bank. (Madden v. Ky., supra).

In the Madden case this Court pointed out that John E. Madden was a citizen and resident of Fayette county, Kentucky. Under Kentucky law (Sec. 4047 and 4114i-12 Kentucky Statutes) he was required to disclose under oath the various items of property owned by him, including intangibles. Under pertinent provisions of the Kentucky Statutes relating to franchise-paying corporations (Sec. 4078, Ky. Statutes) the appellee herein, Trustee for the Kentucky Fuel Gas Corporation, was required to and did file a verified statement wherein he reported the Postal Savings certificates which are sought to be taxed. If the appellee had failed to so report, as did the taxpayer in the Madden case, the Kentucky taxing authorities would have been in the identical position as they were when John E. Madden failed to report the amount of money on deposit in out-of-state banks.

The only distinction noted in the Madden case between the tax on deposits in Kentucky banks and the taxation of deposits in out-of-State banks was "the difference in the tax collection." This same basis of distinction for purposes of classifying Postal Savings certificates and other intangible property is here presented.

The tax on these Postal Savings deposits "* * * still resembled that on investments in Watson v. State Comptroller, the collection of which was said to depend 'either

upon (the taxpayer's) will or upon the vigilance and discretion of the local assessors.' "

So we submit that:

"The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection." (*Madden* v. *Ky.*, supra). See *Carmichael* v. *Southern Coal and Coke Co.*, 301 U. S. 495; 81 L. Ed. 1245; *Watson* v. *State Comptroller* of N. Y. 254 U. S. 122, 65 L. Ed. 170.

As was made clear in the Madden case, supra, there is little or no difficulty or expense in collecting taxes at their source. In the matter of state and national bank deposits there is a certainty of collection and an absence of administrative problems. These conditions do not obtain with respect to the assessment and collection of taxes on other types of intangible property such as Postal Savings deposits and the deposits in out-of-state banks. The District Court and the Circuit Court of Appeals appear to have disregarded this basis for a different classification.

II.

The Postal Savings System Is Not A Governmental Borrowing Agency, But Is A Banking System, by Which the Government Receives and Holds Private Funds as Trustee. These Private Funds are Subject to State Taxation.

A. Congress did not create a Governmental borrowing agency when it established the Postal Savings system.

The District Court in its opinion stated that "the Postal Savings system, as now constituted, is a Governmental financing agency". And although not specifically stated in the opinion of the Circuit Court of Appeals, the paramount thought seems to have been that the existence of the Postal Savings system would somehow be endangered if the States were permitted to tax Postal Savings certificates.

An examination of the message of the President of the United States to Congress, and the history leading up to the passage of the Postal Savings Depositories Act, will disclose that Congress had no intention whatever to create a borrowing agency of the Federal Government. Instead, it will be found that the only intent and desire of Congress was to provide safe banking facilities for small depositors who were afraid of banks.

It will be remembered that this country in 1907 passed through a major panic in which thousands of banks failed and bank deposits had been cut in half. Half of these bank deposits had gone into sugar bowls and pine knot holes and Congress was aware of this situation when the Postal Savings Depositories Act came before them. (45 Cong. Record Appendix, page 314). At the time there was widespread demand for either insured bank deposits or a postal savings system similar to that operated in other countries. Indeed the platforms of the two major parties mirror this:

> "We favor the establishment of a postal savings bank system for the convenience of the people and the encouragement of thrift." (Republican)
>
> "We favor a postal savings bank if the guaranteed bank can not be secured, and believe that it should be constituted so as to keep the deposited money in the communities where the depositors live. But we condemn the policy of the Republican party in proposing a postal savings bank under a plan of conduct by which they will aggregate the deposits of rural communities and deposit same while under government charge in the banks of Wall street, thus depleting the circulating medium of the producing regions and unjustly favoring the speculative markets." (Democrat)

In a message to Congress December 3, 1907, President Roosevelt said:

> "I commend to a favorable consideration of the Congress a postal savings bank system, as recommended by the Postmaster General. The primary object is to encourage among our people economy and

thrift and by the use of postal savings banks to give them an opportunity to husband their resources, particularly those who have not the facilities at hand for depositing their money in savings banks."

President Taft, in his message of December 7, 1909, said:

"I believe them to be necessary in order to offer a proper inducement to thrift and savings to a great many people of small means who do not now have banking facilities and to whom such a system would offer an opportunity for the accumulation of capital. They will furnish a satisfactory substitute based on sound principle and actual successful trial in nearly all the countries of the world for the system of government guaranty of deposits now being adopted in several Western States, * * *."

In the Congressional debate we find:

"To sum up, then, the benefits of this law: First, it will provide a place for the savings of the millions of very small depositors in the United States living where no mutual savings banks exist. Second, it will furnish a place for the deposit of money and of savings in nearly 40,000 small communities where no banks now exist. Third, it will furnish a place for the deposit of foreigners who are educated to believe in government depositories, and for the small number of people who are afraid of all banks. Fourth, judging from the history of its operations in other great countries, this law will add millions of dollars to the available business capital of the country. Fifth, it will encourage habits of thrift and economy, especially among children, students and people of small means." (45 Cong. Rec. Page 7701).

Again we find:

"The experience of other countries, that of our own savings banks and that of the penny provident fund, all lead to the conclusion that a system such as this that makes it easy to save will lead to saving and thrift. They also show that the system instead of interfering

with, will be a feeder for the banks. If there is any such natural tendency, then the construction of this bill and the disposal of the deposits that it contemplates will give it every aid. I firmly believe that time will prove this as notable a piece of legislation as Gladstone considered the English system, which he called his best work." (Appendix, Page 314 of 45 Congressional Record).

"If Congress should legislate in favor of this desirable economic condition—to promote the habit of thrift, economy and of saving—and it can do so constitutionally, then certainly it is desirable that it should. There is no more basic fact connected with our industrial progress and with our commercial success than the keeping of the money of the country in channels of circulation ready for investment in every enterprise that shall make for material and for commercial growth. Another reason which has been urged is that in time of financial stress and panic, when money is withdrawn from the banks and therefore withdrawn from circulation, this money deposited in these national depositories would remain there and therefore remain in circulation on account of the absolute confidence which would exist on the part of depositors. While those small depositors are the most sensitive class of our people during a financial depression, and the first to make a run on the banks, yet they would permit it to remain in these depositories and in circulation among the people ready to respond to business demands, and thus would avert the result of such a financial panic." (Rep. Small, Appendix 318 of 45 Congressional Record).

Let us look to the Report of the Committees:

"The effect of postal saving depositories upon established banks has been touched upon in this report at some length and in considerable detail. But separately and apart from the incidental effect on the profits of any particular business, it must always be borne in mind that *the dominant idea in connection with the postal saving is to encourage thrift and a saving disposition among the people.* When account is taken

> of the fact that between 40 and 50 per cent of the depositors in this class of institutions is made up of children and students, no one can fail to perceive that the habit of saving then inculcated in the minds of the youth of the country will be of far reaching and permanent benefit to the rising generation. The child trained to save will grow up with the habit of saving more firmly fixed as the years go by. The shiftless and the thriftless are a burden to society, and any public policy calculated to forestall an increase in the number of such thoughtless people can not but prove beneficial to the whole country." (Emphasis ours) 61st Congress, House Committee Report No. 1445.

It may be argued that because of the 1912 and 1916 amendments to the Postal Savings Depositories Act an intention was manifested on the part of Congress to change the Act to a governmental borrowing agency. However, this argument is not supported by the record. By the 1912 amendment, no change was made in the method of investing funds. By the 1916 amendment there was a change made by the Senate. In discussing this change, Mr. Moon of the House Committee said:

> "The effect of the senate amendment on the original bill was thus: It provided that funds might be deposited in State banks and saving institutions other than those that they were not members of the Federal reserve board. That is a change in the law. It however gives preference to the reserve banks. It is further provided that the board of trustees might take as security for the postal funds not only bonds which were supported by the taxing power, but any bonds authorized by an Act of Congress; for instance, if you passed the rural credits bill the farmers' land and bonds might be for acceptance under the provisions of this bill. That is a change in the law recommended by the Senate and agreed to by the conferees." 53 Cong. Rec. P. 7800.

This is the reason for the passage of the 1916 amendment and not, as will be argued by the appellee, to create a "governmental borrowing agency". The real purpose was

to loosen the rule as laid down in 1910 which only let the Board of Trustees buy tax supported bonds. So, in fact, in 1916 the Postal Savings depositories became less of a Governmental agency than it had been in 1910, because non-tax supported securities might be purchased.

We ask indulgence of the Court to quote from the Conference Report 661 of the 64th Congress (53 Cong. Rec. P. 7798-7800).

> "So much as related to the investment of postal savings funds is stricken out, and in lieu thereof provision is made that when the banks in a State refuse or are unable to accept postal savings deposits originating in that State and the deposits are not needed to make up the 5 per cent reserve fund the board of trustees are empowered to invest such funds. *The authority conferred upon the president to direct the investment of postal savings funds when, in his judgment, the general welfare and interests of the United States so require is continued in the exact terms of the original postal savings act.*" (Emphasis ours).

Thus the 1916 Act did not change this power, and Congress in a joint conference report so stated.

Such being the history and purpose of the Postal Savings Depositories Act, we know of no constitutional principle which would permit or empower the administrative branch of the Government to change the intent and purpose of the legislature. "The intention of the law makers constitutes the law." *Atkins* v. *The Disintegrating Co.*, 18 Wall, 272, 21 L. Ed. 841.

It is perfectly true that under the provisions of the Postal Savings system the trustees of the fund may cause 95% of the funds on hand to be invested in Governmental bonds or other securities. (Title 39 Sec. 759 U. S. C.) This is of course accepted banking practice. This authority given to the trustees would no more convert the Postal Savings system into a governmental borrowing agency than would the investment by national banks of their deposits in

government bonds convert such banks into governmental borrowing agencies.

The assumption that a statute conferring power upon the trustees of Postal Savings deposits to invest same in Government bonds *ipso facto* converts the Postal Savings system into a governmental financing agent is based upon a false premise. The only manner in which the Postal Savings system can be converted into a governmental financing agency is by the authority and act of the legislative branch of government which created the Postal Savings system, and this Congress has not done. The trustees of these funds are holding the funds for the depositors. The deposits belong to the depositors and can be withdrawn at any time. These funds are neither the property of the Postoffice Department nor of the Federal Government. *Leka* v. *U. S.* 69 Ct. Cl. 79, 90; *U. S.* v. *Stewart,* 30 Fed. Sup. 200, 119 Fed. 2nd. 492, 493. Nowhere in the procedure under Sec. 759 Title 39 U. S. C. does the Federal Government borrow any money.

If the government does not borrow this money, but merely holds it subject to the demand of the depositors, there is no basis for the proposition that the Postal Savings system is a Governmental borrowing agency.

Under the section of the Act referred to, Postmasters and the named officers are required to receive and hold as trustees the funds of persons desiring to use Postoffice facilities for deposits rather than state or national banking facilities. No governmental borrowing facilities are authorized or exercised by Postal Savings Depositories Act except under Sec. 760 Title 39 U. S. C., and the bonds therein provided for are in no manner involved in this case.

B. Private Funds held by the Federal Government or Its Agents as Trustees are Subject to State Taxation.

This Court is again presented with a situation where a private corporation is asking to be relieved from state taxation of its private property because of some speculative effect which might result to the Federal Government.

Situations have arisen where the courts have protected private individuals and corporations from the payment of State taxes on the bonds and securities of the Federal Government where the Government had exercised its power to raise money for the purpose of carrying on its civil and military operations.

However, it must be emphasized that such conditions do not here obtain under the facts presented in this record because, as pointed out above, the Postoffice department is only holding the postal savings deposits of the appellee as trustee. The funds remain the property of the Kentucky Fuel Gas Corporation. Such being the true condition, it would no more embarrass the Federal Government for the appellee to be required to pay taxes on money deposited with the Postmaster at Ashland, Kentucky, than it would embarrass the Government for a Kentucky taxpayer to pay taxes on money held by the Government in a bankruptcy proceeding.

In the case of *Swarts* v. *Hammer,* 194 U. S. 441, 49 Law Ed. 1060, there was involved the validity of state, school and city taxes imposed upon $68,200.00 belonging to the estate of a bankrupt in the hands of a trustee in bankruptcy. This Court, as did the Circuit Court of Appeals, (120 Fed. 256) held that the taxes were valid and collectible, in view of the fact that the bankruptcy act did not exempt the property from taxation (without deciding that Congress had the power to grant such exemption).

As of June 9, 1940, the National Banks of America owned $7,219,890,000.00 of direct obligations of the U. S.

Government, and $1,891,336,000.00 of obligations guaranteed by the U. S. Government (Tr. R. P. 9). A large part of these funds undoubtedly represented the deposits of taxpayers of the various States. These deposits were subject to State taxation. (*Clement National Bank* v. *Vermont*, 231 U. S. 120, 58 Law Ed. 547).

The fact that the national banks used the funds of depositors to purchase government bonds did not convert such banks into governmental borrowing agencies, and did not render the depositors of such funds in the bank immune from non-discriminatory state and local taxes. *Clement National Bank* v. *Vermont*, supra.

Postal Savings certificates are taxable in the State of Indiana. There was involved in the case of *Lutz* v. *Arnold*, 193 N. E. 840, the validity of a State Statute which taxed Postal Savings certificates along with other intangible property. In upholding the validity of the Statute, the Supreme Court of Indiana said:

> "We cannot see in what manner or in what way the Act would affect the power to borrow money on the credit of the United States. Neither can we see how it would affect the establishing of postoffices or impose a burden upon the exercise of the power to establish postoffices.
>
> "Title 39 U.S.C.A. Section 758, The Postal Service, provides that postal savings may be withdrawn upon demand. These deposits, as we construe the Act, do not in the strict sense amount to a loan to the United States Government, and therefore the power to borrow money on the credit of the United States is not interfered with or involved. In speaking of the power to tax, the Supreme Court of the United States, in the case of *First National Bank* v. *Kentucky*, said: 'That limitation (upon the power to tax) is, that the agencies of the Federal Government are only exempted from State legislation, so far as that legislation may interfere with, or so far impair their efficiency in performing

> the functions by which they are designed to serve that Government'.
>
> "It can not be successfully maintained that the tax in question interferes with or impairs the efficiency of the government service, nor in the slightest degree diminishes the power of the government to borrow money".

In view of the nature of the property sought to be taxed, which are Postal Savings certificates, by the terms of which the holder can demand immediate payment of his money from the Postoffice Department, it is submitted that this Court's opinion by Mr. Justice Brown, in the case of *Hibernia Savings and Loan Society* v. *San Francisco,* 200 U. S. 310, 50 Law Ed. 495, states the correct principle which is here applicable. It was said:

> "The basis of this assumption is the fact that a tax upon the obligations of the United States is virtually a tax upon the credit of the Government and upon its power to raise money for the purpose of carrying on its civil and military operations".

Since these certificates represent money which can be withdrawn immediately upon demand, and since by the terms of Sec. 759 Title 39 U.S.C., as construed by the Courts, the Postoffice Department holds these funds merely as trustee, there can not be involved any tax upon the credit of the Government or upon its power to raise money for the purpose of carrying on its civil and military operations.

If this be true, then the only question presented to this Court is whether or not there has been a proper classification for the purpose of taxation.

III.

If Congress has the Power to Exempt the Owners of Postal Savings Certificates from State Taxation, It Has Not Exercised Such Power.

A. The Postal Savings Depositories Act exempts from taxation only the bonds provided for in Sec. 760 of Title 39 U. S. C. and under the long established and well recognized rule that the mention of one thing implies the exclusion of another (Taylor v. Barker, 95 N. Y. 474, 475; Crawford's Statutory Construction, page 685; Kendall v. U. S., 107 U. S., 123; Brown v. Md., 12 Wheat, 419; 6 Law Ed. 678, 685; U. S. v. De La Maza Arrendondo, 6 Pet. 691, 8 Law Ed. 547; Jones v. Croswell, 60 Fed. 2nd, 827) the Act itself shows an intention on the part of Congress not to exempt Postal Savings certificates provided for under Sec. 759 of Title 39 U. S. C., even if it had such power.

If Congress had the power to take away from the states the right to levy a non-discriminatory tax upon private property deposited with a local Postmaster, the exercise of such power is not to be implied. *Swarts* v. *Hammer,* supra; *Clement National Bank* v. *Vermont,* supra; *Commissioner of Banks* v. *Chase Securities Corporation,* 10 N.E. 2nd, 472, 488, and cases therein cited.

Mr. Justice McKenna in the Swarts v. Hammer case pointed out that "the question is not the extent of the power of Congress * * * but what Congress intended by the Act * * *. If Congress has the power to declare otherwise, and wished to do so, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations. * * *".

Having dealt with the question of exemption from State taxation, Congress unquestionably reached the conclusion that the taxation of Postal Savings certificates by the states would in no wise affect the operations of the

Federal Government. (*McClellan* v. *Chipman,* 164 U. S., 347; *Graves* v. *New York,* 306 U. S. 450.)

The conclusion reached by Congress is logical. That body of law makers must have recognized that it had only authorized the Postoffice Department to hold the funds of depositors as trustee, and that the funds so held could in no sense, nor for any purpose, be considered governmental funds, especially in view of the fact that they could be withdrawn at any time.

With the adoption by Congress of the policy that Postal Savings certificates should not be exempt from State taxation, it does not lie with the courts at any subsequent date to change this fixed policy of the law makers. *Green* v. *Frazier,* 523 U. S. 233; 6 Law Ed. 878; *C. B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 55 Law Ed. 328; *L. & N. R. R. Co.* v. *Ky.,* 183 U. S. 503; 46 Law Ed. 298.

In view of the fundamental rule as recognized and adhered to by this Court in the above cases that it lies wholly and solely with the legislative branch of the Government to determine the policy to be adopted in the matter of legislation, it is earnestly submitted that the Circuit Court of Appeals went too far in its opinion when it changed the policy which had been definitely expressed by Congress in not providing for exemption from taxation of Postal Savings certificates.

B. Sec. 3701 U. S. Revised Statutes has no relation to the Certificates and Bonds provided for in the Postal Savings Depositories Act.

The opinion of the District Court discloses that the above Statute was considered to be controlling, because this language will be found in the District Court's conclusions of the law:

> "Postal Savings certificates are obligations of the United States exempt by Congress from State and

other local taxation by the provisions of Sec. 3701 of the Revised Statutes of the United States, 31 U.S.C.A. Sec. 742". (Tr. Rec. P. 18.)

1. This exemption Statute is the handiwork of a statute reviser, being an assembly of seven separate Acts of Congress passed in the years 1862 to 1870.* Each of these separate Acts authorized a specific indebtedness for the purpose of financing the Civil War, and the exemptions from taxation provision only covers the securities mentioned in each of the Acts.

This Court, with reference to the revised Statutes, has said:—"* * * In construing it we may refer to the purpose and scope of the Act from which it was derived". *U. S.* v. *Mason*, 218 U. S. 517, 525; 54 Law Ed. 1153.

In the title of the Act of Congress in adopting the U. S. Code, it is provided:—"But nothing in this Act shall be construed as repealing or amending any such law, or as enacting into new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactment". Title 1; U. S. C. page 3.

> "The change of arrangements which places portions of what was originally a single section into two separate sections can not be regarded as altering the scope and purpose of the enactment, for it will not be inferred that Congress in revising and consolidating the laws intended to change their effect unless such intention is clearly expressed". *Anderson* v. *Pacific Co.*, 225 U. S. 187, 198, 56 Law Ed. 1047.

The phrase in Sec. 3701 R. S. "and other obligations of the United States" was taken from the Act of Congress of June 30, 1864, Chapter 172, Sec. 1, 13 Stat. 218. In this

* 12 Stat. 346; 12 Stat. 710; 13 Stat. 13; 13 Stat. 218; 13 Stat. 425; 13 Stat. 468; 16 Stat. 272

Statute of 1864, we find:—"An Act to provide ways and means for the support of the Government, and for other purposes". And there is this further provision:—"And all bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal authorities". The enactment of this Statute was forty-six years before the Postal Savings system was established, and there was no intention whatever on the part of Congress to do other than to finance the Union at that time.

The "obligations" intended to be exempt were the obligations issued for money to support the Government. In the Act bonds, treasury notes, certificates of deposits, and notes of fractions of a dollar were provided for. Instead of using all of these terms, the general term "obligation" was used. This was the first Act in which so many forms of indebtedness were provided.

In construing 13 Stat. 218, it must be remembered that Congress for a century has followed the policy of exempting in each Act the evidence of indebtedness authorized thereunder. The established policy of Congress may be resorted to in construing an Act. See *U. S.* v. *Sweet*, 245 U. S. 563, 62 Law Ed. 473.

In the discussion of this Act, Mr. Hooper of the Ways and Means committee of the House of Representatives of 1893, said as to the exemption provision:

> "In reply I would say that I do not think the Committee looked to any theory about it. They found the general practice since the commencement of the Government had been to exempt from taxation the obligations of the Government issued by the United States under loan bills". Congressional Globe (1863-64, P. 3183).

Then when it was pointed out that there might be a purpose in Mr. Hooper's and the Committee's minds to

exempt more than the securities authorized by the Act, Mr. Hooper said that he would be glad to join in an amendment. This was accepted by the members of the House as a complete indication of no purpose to change this policy or to do more than exempt the securities authorized by that Act. (Congressional Globe 1863-64, P. 3184.)

13 Stat. 218 was only one of a series of acts which raised money by authorizing indebtedness during the Civil War. As Mr. Hooper said "the general practice had been to exempt from taxation the obligations of the Government issued by the United States under loan bills."*

In *Ozawa* v. *U. S.*, 260 U. S. 178, the Supreme Court said:

> "If Congress—desired to alter a rule so well and so long established, it may be assumed that its purpose would have been definitely disclosed and its legislation to that end put in unmistakable terms.
>
> "We are asked to conclude that Congress without the consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability of so fundamental a change nevertheless—has radically modified a statute always theretofore mentioned and considered as of great importance. It is inconceivable that a rule in force from the beginning of the government—would have been deprived of its force in such dubious and casual fashion."

Not only is there no suggestion of an intention to change to a general tax exemption policy shown in the Congressional Globe but to the contrary there is proof that an amendment expressly making the bonds subject to taxation required the change of only two votes in the house. (Congressional Globe, 1863-1864 P. 3187.)

Further it will be found that since the passage of 13 Stat. 218, Congress has continued the practice of exempting

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* Some of the previous Acts in which this practice was followed are:
12 Stat. 346; 12 Stat. 352; 12 Stat. 710; 13 Stat. 13.

in each act authorizing indebtedness, the evidence which that act authorized.** This policy would not have been continued if 13 Stat. 218 exempted other evidences of indebtedness than that created by 13 Stat. 218.

> "When several Acts of Congress are passed touching the same subject matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."
>
> *Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 309.

Further in the 26 Cong. Rec. P. 8209, it is said:

> "But I do not think it was ever contemplated by Congress, even during the war—that having relation only to the original amount of Treasury notes issued—there now being in circulation $346,000,000, that such a large amount of property should be perpetually exempted."

So in 1894 Congress assumed that 13 Stat. 218 only related to the notes, etc., issued thereunder.

We must presume that each portion of a statute is placed therein for a purpose *(Ex Parte Public Nat. Bank,* 278 U. S. 101, 73 L. Ed. 202) and that Congress would not do a vain and useless thing. Hence we find that Congress has never considered 13 Stat. 218 as creating a general exemption provision for if it were a general exemption provision then these many exemption provisions found in subsequent acts were useless.

So we submit that the "scope and purpose" of 13 Stat. 218 was only to exempt the evidences of indebtedness authorized therein, leaving future indebtedness to be exempted in future acts, and was not to create a general exemption provision.

** The Acts of Congress since 1863 which we have found (omitting merely amendatory acts): 13 Stat. 468; 16 Stat. 272; 22 Stat. 165; 30 Stat. 467; 31 Stat. 46; 32 Stat. 484; 36 Stat. 817; 38 Stat. 268; 40 Stat. 35; 40 Stat. 292; 40 Stat. 1310; 48 Stat. 129; 48 Stat. 343; 49 Stat. 20.

The unbroken policy of Congress of exempting in each Act authorizing an indebtedness the evidence of this indebtedness has been noticed by authorities of Federal financing:

> "In the first place, it appears that the states had looked with a jealous eye on the Federal debt as a possible source of taxes, and that the effort to thwart any such intentions led to the insertion of a section *in each of the loan acts* declaring bonds to be free from all taxation by or under State authority". (Emphasis ours.) Love, Federal Financing P. 111. Columbia University Press (1931).

See, also, the case of *People* v. *Hoffman*, 37 N. Y. 9, wherein the Court of Appeals of the State of New York held that the certificates of indebtedness issued under 12 Stats. 352 were taxable. On a writ of error the Supreme Court in reversing this decision (*The Banks* v. *The Mayor*, 7 Wall, 16) was forced to drop back to the doctrine of governmental immunity instead of holding these exemption provisions applicable as was done in the companion case (*People* v. *Supervisors*, 7 Wall, 206) wherein the question of whether Treasury notes issued under 12 Stat. 345, were taxable was presented. Here, then, we had companion cases in the Supreme Court.

In the *Mayor* case the question was presented whether certificates of indebtedness not issued under 12 Stat. 345, 12 Stat. 709, 13 Stat. 13, 13 Stat. 218 or 13 Stat. 425, were exempted from state taxes by the exemption provisions provided thereunder.

In the *Supervisors* case the question was presented whether treasury notes provided for under Section 12 Stat. 345 were exempted by the provisions of these acts. *In the Mayor case the court did not attempt to treat these seven acts as general exemption provisions. In the Supervisors case the Court held that notes issued under an act were exempted by the exemption provision of that act.* So in neither case were these acts in question treated as general

exemption sections but instead were construed in accordance with the New York Court of Appeals decision that "the language is to be applied in each case to the issues authorized by the Acts in which it is found".

From the foregoing authority it is submitted that this Court would not be authorized to construe Revised Statutes Sec. 3701 as having any application at all to the claimed exemption. The proper rule is stated in *Federal Reserve Bank of Dallas* v. *Webster*, 287 Fed. 579, 586.

> "In construing the Revised Statutes, the presumption is against an intention to change the meaning and construction of a statute reenacted therein. Mere changes in phraseology arising from a condensation are not to be regarded as changing the preexisting law. Nor is it to be inferred that Congress, by consolidating or transposing earlier provisions, intended to change their effect unless an intention to do so is clearly expressed".

When the Revised Statutes were adopted, there was no shown intent to create a broad general exemption of governmental indebtedness. The sole purpose was merely to simplify the law and codify the many statutes on the books.

2. If Sec. 3701 Revised Statutes could be considered as relating to the question here presented, the enactment of the Postal Savings system had the effect of repealing Sec. 3701 as it would relate to Postal Savings certificates, since the Postal Savings Depositories Act itself contains a specific exemption provision. (Title 39, Sec. 760, U.S.C.)

In *Cook County National Bank* v. *U. S.*, 107 U. S. 445, 27 Law Ed. 537, 539, Mr. Justice Field enunciated the rule of statutory construction which we submit is here controlling. Said he:

> "The doctrine as to repugnant provisions of different laws is well settled, and has often been stated in decisions of this court. A law embracing an entire subject, dealing with it in all of its phases, may thus withdraw the subject from the operation of a general law as effectually as though as to such subject the general law

were in terms repealed. The question is one respecting the intention of the legislature. And although as a general rule the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject.

See *Tracy* v. *Tuffly*, 134 U. S. 206, 33 Law Sd. 879; *Callahan* v. *U. S.*, 285 U. S. 515, 76 Law Ed. 914.

IV.

The Doctrine of Governmental Immunity from Taxation Is Not Applicable to Postal Savings Deposits.

Our next problem is to show that the doctrine of Governmental immunity from taxation does not or should not exempt Postal Savings Deposits, held by a private citizen, from a non-discriminatory property tax.

The Genesis of the immunity doctrine is *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

No provision is found in the Constitution which provides for this immunity. But regardless of this silence of the Constitution, the Court in 1819 found it necessary to create the doctrine of implied immunity to protect an important Federal policy from complete frustration at the the hands of dissident states. The Bank of the United States was established in 1816 and within three years eight states had enacted laws designed to penalize the bank or expel the branches from their territory. (Warren, *The Supreme Court*, I, 505-506.)

The arguments upon which the case rested had their their roots in actuality, but they have been distorted by sterile refinements unrelated to affairs. (Concurring opinion of Mr. Justice Frankfurter, *Graves* v. *New York, ex rel. O'Keefe*, 306 U. S. 466, 488-489.)

In *McCulloch* v. *Maryland,* supra, the State of Maryland had passed a taxing Act aimed at the branch of the Bank of the United States. The tax was a tax on "operations"; the issuance of notes, thus being an excise tax on an activity of the bank.

In invalidating this tax law, Mr. Chief Justice Marshall had occasion to say:

> "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank and is, consequently, a tax on the operations of an instrument employed by the Government of the Union to carry its powers into execution."
>
> (4 Wheat. 316, 336-437.)

So it is to be noted that Mr. Chief Justice Marshall did not extend his opinion to either the real property of the bank or the intangible property of citizens of Maryland in the institution.

Indeed it is to be noted that the whole tenor of the opinion is that a tax on the "operations" or "means employed" by the Government or a Governmental agent is invalid but there is no indication that a non-discriminatory property tax would be invalid.

It is to be remembered that Mr. Chief Justice Marshall was a thorough Federalist (Beveridge, *The Life of John Marshall),* and in his zeal it is submitted that he wrote too far:

> "If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may

tax patent-rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government."

Indeed this dictum has already begun to crumble for patent-rights are taxable *(Fox Film Corp.* v. *Doyal,* 286 U. S. 123) and as noted by Mr. Justice Frankfurter the power to tax is not the power to destroy (306 U. S. 490).

Five years later in *Osborn, et al.* v. *The Bank of the United States,* 9 Wheat. 738, 6 L. Ed. 204, Mr. Chief Justice Marshall clearly indicated that tax on the property of a bank was not invalid:

"It will not be contended that the directors, or other officers of the bank, are officers of government. But it is contended, that, were their resemblance to contractors more perfect than it is, the right of the state to control its operations, if those operations be necessary to its character, as a machine employed by the government, cannot be maintained. Can a contractor, for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. *It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank.* But we do not admit that the act of purchasing, or conveying the articles purchased, can be under state control." (Emphasis ours.)
9 Wheat. 738, 867.

Again we find the inference that a tax on the property of the Government is not invalid but that a tax on the activity of the government is.

In *Weston, et al.* v. *The City Council of Charleston,* 2 Pet. 449, 7 L. Ed. 481, Mr. Chief Justice Marshall revised

his views on governmental immunity. The United States Government had lived through forty-two years and was growing strong. Marshall, always the exponent of strong central government, was called upon to judge the validity of a tax laid by Charleston on the ownership of stock of the United States. To the Chief Justice, no hindrance, no matter how small, should be placed in the way of the growth of these Federal powers which he had nurtured so he changed his views on immunity, and held this tax invalid. But he did not succeed in carrying the whole court with him. For out of the six justices sitting, two of them dissented.

The *Weston* opinion has been the cornerstone for extending the immunity to treasury notes (*Bank* v. *Sup.*, 7 Wall. 26), and bonds of the U. S. (*Banks* v. *The Mayor*, 7 Wall. 16).

It is important to examine the frame upon which this decision was hung. Three timbers were incorporated:

(1) There is no difference between a law "prohibiting loans to the United States" and a property tax on the evidence of the loan in the hands of the lender.

(2) The tax would affect the terms on which the Government borrowed.

(3) As the power to tax is the power to destroy, a State may not tax the Federal Government.

We believe that if one looks behind the folds of this dictum embroidered opinion, it will be seen that the frame timbers were green and untried, that they have long since dry-rotted, and that the mere drawing aside of the folds has caused the frame of reason to collapse.

Mr. Justice Frankfurter points to the *Weston* opinion as an example of the "distorted-sterile refinements" of the *McCulloch* opinion, 306 U. S. 466, 489.

Let us examine these timbers:

A. Is there a Difference between a Law prohibiting Loans to the United States and a Property Tax on a Chose in Action in the Hands of the Lender?

As to this point we feel that Mr. Justice Thompson's dissenting opinion so aptly shows the faulty reasoning that little more is necessary:

> "In the case now before us, the tax is not direct upon any means used by the government to carry on its operations. It is only a tax upon property acquired through one of the means employed by the government to carry on its operations, viz.; the power of borrowing money upon the credit of the United States; and it is not perceived how any just distinction can be made in this respect, between bank stock and stocks of the United States; both are acquired through the medium of means employed by the government in carrying on its operations; and both are held as private property; and it is immaterial to the present question in what manner it was acquired."
>
> (2 Pet. 449, 473–480.)

There is the difference between the taxes struck down in the *McCulloch* and *Osborn* cases. Those taxes were on activities or means used by the Government or its agent. The tax in the *Weston* case was a property tax on intangible property in the hands of the private owner.

In *State Tax on Foreign Held Bonds,* 15 Wall. 300, 320, 21 L. Ed. 179 it was said:

> "The bonds issued by the railroad in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors."

So we say that the property in the case at bar is property in the hands of the holders and not the government.

As we have already pointed out, Mr. Justice Frankfurter indicates *Weston* v. *Town of Charleston* as a "sterile refinement" of *McCulloch* v. *Maryland.*

If there is a place for the doctrine of governmental immunity it has limitations.

> "The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations.
>
> "It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland,* 4 Wheat 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions.' *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570, 576, 579. Where the immunity exists, it is absolute, resting upon 'an entire absence of power' (*Johnson* v. *Maryland,* 254 U. S. 51, 55, 56), but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' *Willcuts* v. *Bunn,* 282 U. S. 216."
>
> *Fox Film Corp.* v. *Doyal,* 286 U. S. 123.

The immunity should extend to taxes on the government but not one step beyond, to private citizens.

> "The mere fact that the government may to some extent be affected no longer serves to invalidate a non-discriminatory tax laid upon a private person."
>
> Amicus Curiae Brief of the Solicitor General of the United States, Mr. Robert H. Jackson, in *Graves* v. *N. Y., ex rel. O'Keefe,* 306 U. S. 467.

We submit that a non-discriminatory property tax placed upon the choses in action owned by a private person is no more a direct burden on the Federal Government than a non-discriminatory property tax on vehicles in interstate commerce is a burden on that commerce.

In *Brown* v. *Maryland*, 12 Wheat. 419, 449, 6 L. Ed. 678, Justice Marshall said, while invalidating a state tax on importers:

> "*Or what should restrain a state from taxing any article passing through it from one state to another, for the purpose of traffic?* or from taxing the transportation of articles passing from the state itself to another state, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up, and considered with great attention, in McCulloch v. The State of Maryland, 4 Wheat. Rep. 316, the decision in which case is, we think, entirely applicable to this." (Emphasis ours.)

So the Chief Justice held that the doctrine of *McCulloch* v. *Maryland* exempted property in interstate commerce for purposes of traffic. Yet the Supreme Court has completely repudiated this application of *McCulloch* v. *Maryland* by allowing the states to place a non-discriminatory property tax on property moving in interstate commerce for purposes of traffic.

> "The commerce between the states may not be interfered with by taxation or other interruption, but its instruments and vehicles may be."
>
> *Morgan* v. *Parham*, 16 Wall. 471, 21 L. Ed. 303, Also *Pullman Palace Car Co.* v. *Penn.*, 141 U. S. 18, 35 L. Ed. 613; *Johnson Oil Ref. Co.* v. *Okla.*, 290 U. S. 158, 78 L. Ed. 238.

> "Although rolling stock, such as these cars, is employed in interstate commerce, that fact does not make it immune from a non-discrimintatory property tax in a State which can be deemed to have jurisdiction."
>
> *Johnson Oil Co.* v. *Okla.*, supra.

Thus if the applicability of the *McCulloch* v. *Maryland* doctrine to taxation of property engaged in intenrstate commerce has been repudiated, it must follow that the applicability of this doctrine to taxation of property held by private owners should likewise be repudiated.

If a property tax on a vehicle moving in interstate commerce is not a burden on that commerce, there is no justification for the assumption that a property tax on a Postal Savings account in the hands of the depositor is a burden on the Federal Government.

In like manner we may point out that *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, 10 L. Ed. 1022, and *Collector* v. *Day,* 11 Wall. 113, 20 L. Ed. 122, were founded on the doctrine of *McCulloch* v. *Maryland.* These cases held that a Federal officer could not be taxed on income or salary received from the Federal Government.

> "In our view it presents a case of as strong interference as was presented by the tax imposed by Maryland in the case of *McCulloch,* 4 Wheat. 316, and the tax by the City Council of Charleston, in *Weston's* case, 2 Peters 449; . . ."
>
> *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, 449.

It is ironic that the Justice should pick the *Weston* case as an example of the degree of interference such a tax presented. For it is a poor example that won't work the other way. If the *Dobbins* case presents as strong a case of interference as the *Weston* case, then the *Weston* case must present only as strong a case as the *Dobbins* case. Thus if the *Dobbins* case has been repudiated so should the *Weston* case.

In the *Day* opinion, *McCulloch* v. *Maryland, Weston* v. *Charleston* and *Dobbins* v. *Erie County,* are the cornerstones. It must stand only so long as these cases stand.

In *N. Y. ex rel. Rodgers* v. *Graves,* 299 U. S. 401, 81 L. Ed. 306, *Dobbins* v. *Commissioners of Erie County* was relied upon to support the theory that an income tax could not be collected by a state on the salary of a Government official.

Yet in *Graves* v. *N. Y. ex rel. O'Keefe,* supra, all this was repudiated and the *Day* and *Rogers* opinions were specifically overruled.

Again we may say that if the applicability of the doctrine of *McCulloch* v. *Maryland,* to taxation of incomes of Federal officers has been repudiated, it must follow that the applicability of the doctrine to taxation of Postal Savings held by private owners should be repudiated.

If an income tax on the salary of a Federal official is not an interference with the Federal Government, then a non-discriminatory property tax on Postal Savings accounts held by private owners is not an interference with the Federal Government.

Certain other tax situations present interesting analogies to the case at bar.

A person who exploits lands under a lease from the Federal government cannot claim immunity from a property tax on the oil produced (*Indian Territory Oil Co.* v. *Board,* 288 U. S. 325, 77 L. Ed. 812), or on the machinery and equipment used in the operation. *Tabor* v. *Indian Territory Co.,* 300 U. S. 1, 81 L. Ed. 463. At one time he was immune from taxation on the net income derived from the operations (*Gillispie* v. *Okla.,* 257 U. S. 501, 66 L. Ed. 338, *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 76 L. Ed. 815) but not today. *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, 82 L. Ed. 907.

The state or Federal government may tax the transfer by will of property to the other. *United States* v. *Perkins,* 163 U. S. 625, 41 L. Ed. 287, *Snyder* v. *Bettman,* 190 U. S. 249, 47 L. Ed. 1035.

The manufacturer of goods may be taxed by the United States even though they are sold to the State after manufacture. (*Liggett & Myers Co.* v. *U. S.*, 299 U. S. 383, 81 L. Ed. 295) as may the transfer of goods to the government purchaser. *Wheeler Lumber Co.* v. *U. S.*, 281 U. S. 572, 74 L. Ed. 1047.

So we feel that the first timber upon which Mr. Chief Justice Marshall hung the *Weston* case (i. e., No difference between a tax prohibiting a loan to the Government and a tax on the evidence of that loan in the hands of the lender) has dry-rotted.

B. Will the Tax Affect the Terms on which the Government Borrows?

The second timber supporting *Weston* v. *Charleston* was that the tax would affect the terms on which the Government borrowed. (2 Pet. 449, 468.)

In considering this timber it is interesting to note the other cases in which it is found.

In *Dobbins* v. *Com. of Erie County,* 16 Pet. 435, 448 and in *Gillispie* v. *Okla.,* 257 U. S. 506 (both of which cases have been in effect overruled), we find the reasoning that the economic burden might be passed on to the government. This is, in principle, the same timber, but whatever strength it may originally have had, the case of *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 82 L. Ed. 155, expressly held in response to the Federal Government's concession that the gross tax on its contractors would result in substantially increased costs to the Government:

> "But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax . . ."
>
> 302 U. S. 134, 160

C. The Power to Tax is Not the Power to Destroy.

As to the Chief Justice's third timber supporting the *Weston* decision (i.e. the power to tax is the power to destroy).

> "The arguments upon which *McCulloch* v. *Maryland*, 4 Wheat. 316, rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *McCulloch* v. *Maryland*. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that "the power to tax involves the power to destroy." Id., at P. 431. This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resutling from a doctrinaire application of the generalities uttered in the course of the opinion in *McCulloch* v. *Maryland*. . . ."
>
> "All these doctrines of inter governmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions.' The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen. 'The power to tax is not the power to destroy while this Court sits.' *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 223 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our

federalism and thus, too, when the financial needs of all governments began steadily to mount."

Mr. Justice Frankfurter, *Graves* v. *New York, ex rel. O'Keefe,* 306 U. S. 467, 488.

The proposition that the power to tax is the power to destroy appears to be contradicted by nearly half a hundred decisions of the Court. In thirty-three cases listed below, the Court has sustained taxes on persons who dealt with the Government, which taxes if pressed to discriminatory and oppressive limits, might destroy the governmental function as fully as could the tax in *McCulloch* v. *Maryland.*

Property taxes on contractors:

Thompson v. *Pac. R. R.,* 9 Wall. 579, 19 L. Ed. 792.

Railroad Co. v. *Peniston,* 18 Wall. 5, 21 L. Ed. 787.

Western Union Tel. Co. v. *Cross,* 125 U. S. 530, 31 L. Ed. 790.

Central Pac. Railroad v. *Cal.,* 162 U. S. 91, 40 L. Ed. 903.

Baltimore Shipbuilding Co. v. *Baltimore,* 195 U. S. 375, 49 L. Ed. 242.

Gromer v. *Standard Dredging Co.,* 224 U. S. 362, 56 L. Ed. 801.

Choctaw O. & G. Railroad Co. v. *Mackey,* 256 U. S. 531, 65 L. Ed. 1076.

Property tax on employee:

Dyer v. *City of Melrose,* 215 U. S. 594, 54 L. Ed. 341.

Property tax on lessee:

Thomas v. *Gay,* 169 U. S. 264, 42 L. Ed. 740.

Wagoner v. *Evans,* 170 U. S. 588, 42 L. Ed. 1154.

Ind. Territory Oil Co. v. *Board,* 288 U. S. 325, 77 L. Ed. 812.

Taber v. *Ind. Territory Co.,* 300 U. S. 1, 81 L. Ed. 463.

Property tax on license:

Susquehanna Co. v. *Tax Com.* (No. 1), 283 U. S. 291, 75 L. Ed. 1042.

Broad River Power Co. v. *Query,* 288 U. S. 178, 77 L. Ed. 685.

Tax on sales or payments to contractor:

Fidelity & Deposit Co. v. *Penn.,* 240 U. S. 319, 60 L. Ed. 664.

Trinityfarm Co. v. *Grosjean,* 291 U. S. 466, 78 L. Ed. 918.

Terrill v. *Johnston,* 293 U. S. 533, 79 L. Ed. 641.

Transportation tax:

Wheeler Lumber Co. v. *U. S.,* 281 U. S. 572, 74 L. Ed. 1047.

Manufacturers' tax:

Liggett & Myers Co. v. *U. S.,* 299 U. S. 383, 81 L. Ed. 294.

On Vendor; net income tax on contractor:

Metcalf & Eddy v. *Mitchell,* 269 U. S. 514, 70 L. Ed. 384.

General Construction Co. v. *Fisher,* 295 U. S. 715, 79 L. Ed. 1671.

Atkinson v. *State Tax Com.,* 303 U. S. 20, 82 L. Ed. 621.

Net income tax on employee:

Helvering v. *Gerhardt,* 304 U. S. 405, 82 L. Ed. 1427.

Graves v. *New York, ex rel. O'Keefe,* 306 U. S. 466, 83 L. Ed. 927.

Net income tax on lessee:

Group No. 1 Oil Corp. v. *Bass,* 283 U. S. 279, 75 L. Ed. 1032.

Helvering v. *Bankline Oil Co.,* 303 U. S. 362, 82 L. Ed. 897.

Helvering v. *Mountain Producers Corp.*, 303 U. S. 376, 82 L. Ed. 907.

Net income tax on licensee:

Fox Film Corp. v. *Doyal*, 286 U. S. 123, 76 L. Ed. 1010.

Gross receipts tax on contractor:

Alward v. *Johnson*, 282 U. S. 509, 75 L. Ed. 496.

James v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155.

Mason Co. v. *Tax Comp.*, 302 U. S. 186, 82 L. Ed. 187.

License tax on licensee:

Federal Compress Co. v. *McLean*, 291 U. S. 17, 78 L. Ed. 622.

Property tax on treasury checks:

Hibernia Savings Soc. v. *San Francisco*, 200 U. S. 310, 50 L. Ed. 495.

After the flaws in this timber have been exposed by Justices Frankfurter and Holmes, we proclaim that nothing is left of the frame which supported the *Weston* v. *Charleston* decision exempting from a non-discriminatory property tax bonds of the United States.

As the frame has crumbled, the *Weston* decision should be condemned and then quietly forgotten, as is most other bad fiction of the period.

And so the doctrine of governmental immunity should again return to within the limitations from whence is overflowed and be applicable only to "activities" or "means employed" by the Government.

CONCLUSION.

There is no inclination or intention on the part of the State taxing authorities of Kentucky to interfere with the operations of the Federal Government, which is our Government. However, our Government is not so impotent that the taxation of Kentucky taxpayers holding Postal Savings certificates would operate in any manner to cripple it or to prevent it from being able to secure sufficient funds with which to carry on its functions.

The non-discriminatory intangible property tax levied by the Kentucky Statutes upon its citizens and residents is not of such a character as to interfere with any function performed by the Federal Union, because the credit of the Government is not involved, nor is the holding of Postal Savings deposits for the taxpayers of Kentucky an exercise by the Government of its power to raise money for the purpose of carrying on its civil and military operations.

It is therefore urged that the opinion of the Circuit Court of Appeals and the judgment entered thereon should be reversed.

Respectfully Submitted.

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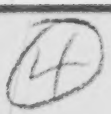

OCT 9 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of United States

OCTOBER TERM, 1942
No. 259

IN THE MATTER OF KENTUCKY FUEL GAS CORPORATION, Debtor, No. 991-B.

H. CLYDE REEVES, Commissioner of Revenue of the Commonwealth of Kentucky, Intervening Petitioner, - - *Petitioner.*

vs.

BEN WILLIAMSON, JR., Trustee of the Kentucky Fuel Gas Corporation.

BRIEF FOR TRUSTEE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROBT. T. CALDWELL,
PORTER M. GRAY,
COUNSEL FOR TRUSTEE OF INLAND GAS CORPORATION,
Respondent.

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Decisious of the Courts Below.

The opinion of the District Court, Eastern District of Kentucky, is reported in 37 Federal Supplement, 625, and the decision of the Circuit Court of Appeals, Sixth Circuit, is reported in 127 Federal Reporter, 657.

STATEMENT.

The Commissioner of Revenue of the State of Kentucky has petitioned for a Writ of Certiorari, to review the decision of the Circuit Sourt of Appeals which affirmed a judgment of the District Court invalidating

an attempted assessment of United States Postal Savings Certificates for State taxes.

The material facts were presented to the District Court by stipulation appearing in the transcript. The District Court's conclusions of law, upon which judgment invalidating the assessment was entered, are as follows:

"1. Postal Savings Certificates are 'obligations of the United States' exempted by Congress from State and other local taxation by the provisions of Section 3701 of the Revised Statutes of the United States (31 USCA, Sec. 742).

2. The Postal Savings System is, as now constituted, a governmental financing agency and, as such, the postal savings certificates issued by it are exempt from taxation under the Constitution of the United States.

3. Taxation by the State of Postal Savings Certificates, or the savings deposits represented thereby, at the rate of 50c per $100.00 of principal amount would constitute an unconstitutional burden on its operations."

ARGUMENT.

I. THE CERTIFICATES ARE EXEMPT UNDER SEC. 3701, REVISED STATUTES.

The first question presented is whether these interest-bearing Certificates, to the payment of which "The faith of the United States is solemnly pledged" as set out in the face of the certificates and as is required by the Act of Congress under which they are issued, are an "obligation of the United States" and, hence, ex-

pressly exempted from State taxation by Section 3701 of the Revised Statutes. If so, it is, of course, unnecessary to determine whether they are also exempt under the Constitution independently of any Congressional enactment.

The Federal Statutes involved are as follows:

Title 39, U. S. C. A., Sections 751 to 769, inclusive, as amended, under which Postal Savings Depositaries are conducted and under which these certificates were issued.

Title 31, U. S. C. A., Section 742, exempting all stocks, bonds, Treasury notes and "other obligations of the United States", from taxation under State, municipal or local authority.

Title 31, U. S. C. A., Section 425, removing the exemption from State taxation in certain cases.
Title 31, U. S. C. A., Section 757c(e), further regulating the withdrawal of Postal Savings deposits.

A copy of the form of Certificate involved is appended to this brief. Section 3701 of the Revised Statutes (31 USCA, Sec. 742), is as follows:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under State or municipal or local authority."

In the petitioner's brief, pages 28 to 35, inclusive, there is presented a somewhat ingenious theory that in enacting Section 3701, in the year 1894, Congress must have had in mind seven existing Acts enacted during the period from 1862 to 1870, each of which specifically exempted some particular form of indebtedness authorized by that Act, and, hence, counsel conclude that "there was a complete lack of Congressional intent to

make R. S. 3701 cover more than these seven acts from whence it came"; although the 1894 Act itself contains no such intimation but on its face confers a general and unqualified exemption in favor of "all other obligations of the United States" except where Congress shall affirmatively subject a particular obligation to such taxation.

As no Court, during the forty-seven years that Section 3701 has been in effect, has ever emasculated it in the manner now proposed by the Kentucky Tax Commission, it does not appear necessary to debate that theory here.

The real question presented is whether Postal Savings Certificates are "other obligations of the United States" within the meaning of the Act. The only decision of the United States Supreme Court cited by petitioner on this point, Hibernia Savings & Loan Society v. City and County of San Francisco, 200 U. S. 310, 50 L. Ed. 495, on more careful inspection will be found to be authority for the exemption of these certificates from State taxation, when the facts there involved are compared with the case at bar. There the tax was applied to two ordinary Treasurer's checks issued in payment of some accrued interest due the payee. The Court, after citing what is now Section 742 of Title 31 exempting obligations of the United States, held that,

> "The basis of this exemption is the fact that a tax upon the obligations of the United States is virtually a tax upon the credit of the government, and upon its power to raise money for the purpose of carrying on its civil and military operations. The efficiency of the government service cannot be impaired by a taxation of the agencies which it employs for such service, and, as one of the most

valuable and best known of these agencies is the borrowing of money, a tax which diminishes in the slightest degree the value of the obligations issued by the government for that purpose impairs pro tanto their market value."

After citing authorities in support of this rule, the Court further held that,

"The principle, however, upon which this exemption is claimed, does not apply to obligations such as checks and warrants, intended for immediate use, and designed merely to stand in the place of money until presented at the Treasury, and the money actually drawn thereon. In such case the tax is virtually a tax upon the money which may be drawn immediately upon presentation of the checks."

And also,

"But where checks are issued payable immediately, they merely stand in the place of coin, which may be immediately drawn thereon. As observed by the court below, the checks were, for all practical purposes, the money itself."

The Court then cited the later Act, which is now U.S.C.A. Title 31, Sec. 425, and which removed the tax exemption from

"circulating notes of national banking associations and United States legal tender notes, and other notes and certificates of the United States, payable on demand, and circulating, or intended to circulate, as currency, etc."

and held that,

"Although the checks in question were not intended to circulate as money, and therefore do not fall within the letter of the statute, the reasons that apply to that class of obligations we think

> apply with equal force to checks intended for immediate payment, though not intended to circulate as money. While the checks are obligations of the United States, and within the letter of Sec. 3701, they are not within its spirit, and are proper subjects of taxation."

It is noted that the Treasury checks there involved were in no sense a means of "raising money for governmental purposes." To the contrary they were used solely as a means for the immediate *disbursement* of money by the Government, being held by the Court to be "for all practical purposes, the money itself."

On the other hand, the Court will take judicial notice that the Postal Savings system is now one of the important means by which the Government raises money, at a low rate of interest, for the purpose of carrying on its various governmental functions. The Certificates bear interest the same as other Government securities, and the fact that they are not actually "intended or immediate use" rather than as a means of Federal financing is further indicated by the provision of Sec. 757 that the interest shall be allowed and entered "once in each year", the certificates themselves bearing a column for the entry of interest credits up to ten years.

The Postal Savings Depositories Act also provides (Title 39 U. S. C. A., Sec. 766), that

> "The faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon as herein provided",

and the Certificates themselves bear the representation on their face that

"The Faith of THE UNITED STATES OF AMERICA Is Solemnly Pledged to The Payment of Deposits With Accrued Interest, Act of June 25, 1910."

Applying the rule announced in the Hibernia case, and the reasons for the rule stated in that opinion, it is evident that these certificates are obligations of the United States within the meaning of Section 3701 and, hence, exempt under the statute.

The only Federal cases dealing specifically with Postal Savings which we find are Farley v. Albers, 112 Fed. (2d) 401, from the Circuit Court of Appeals for the District of Columbia, and Leka v. United States, 69 Ct. of Cl. 79, both cited by petitioner, and U. S. v. Stewart, 30 Fed. Supp. 200, from a Nevada District Court.

In the Stewart case the District Court had before it solely a question of jurisdiction, and held that the local State courts have jurisdiction of any controversy between parties claiming the ownership of Postal Savings deposits, on the ground that "such deposits are trust funds and not the property of the United States", upon authority of the Court of Claims decision in the Leka case. The question of whether Postal Savings certificates are an "obligation" of the United States was not discussed.

The case of Leka v. United States, 69 Court of Claims, 79, relied on by petitioner, is apparently based on an erroneous assumption as to the present workings of the Postal Savings System, as the opinion states that the deposits "are to be held within the State or Community where the deposit was made", and that no part of the fund went into the Treasury of the United

States. That the situation so assumed and made the basis of the ruling of the Court of Claims in the Leka case no longer exists is indicated by the System's own report and by the Statement of the Ashland postmaster which appear in the Stipulation of Facts.

The later holding of the Circuit Court of Appeals for the District of Columbia, in Farley v. Albers, supra, (Certiorari denied, 85 L. Ed. 60), is directly to the contrary. The question directly presented was whether the Postal Savings funds were "funds of the United States Government" and, hence, whether a suit involving them could be maintained without the United States itself being a party. After summarizing the Act, and quoting in its entirety the provision whereby the Government may borrow 95% of the fund, the Court held that,

> "Taken as a whole, the system constitutes a part of both the postal and fiscal operations of the government. Profits are treated as postal revenue, and the fund is held in reserve for emergency use of the government and to facilitate government refinancing operations by the purchase of government bonds. It is safeguarded as other public moneys, and the obligation to the depositors is the pledge of the United States."

And also,

> "The statute, under which it was received by the United States, gave the President the right to invest all or any part of it when in his judgment the general welfare and public interest required. The credit of the United States was pledged for its repayment. This, at the very least, created as between depositor and government the relationship of debtor and creditor, and gave the United States

full control of and full responsibility for its disposition."

The Circuit Court's holding in the Albers case to the effect that these Postal Savings certificates are a form of obligation of the United States, together with the construction of Section 3701 adopted by the Supreme Court in the Hibernia case, clearly brings these certificates within the exemption conferred by that statute and demonstrates the correctness of Judge Ford's ruling upon that ground.

II. POSTAL SAVINGS CERTIFICATES ARE EXEMPT UNDER THE CONSTITUTION.

As stated in the District Court's opinion in the present case,

> "We need not inquire whether postal savings deposits are embraced within the terms of section 3701 of the Revised Statutes (31 USCA, 742) for neither declaration of exemption by Congress nor the absence thereof would add to or detract from complete immunity existing by virtue of the necessary implications of the Constitution."

It is also unnecessary here to go into any extended discussion of the general rule, as announced in recent decisions of the United States Supreme Court, with respect to the extent to which Federal agencies and their employees may be constitutionally subjected to State or local taxation, since we are concerned here only with the degree of exemption extended to Federal financing agencies in particular.

The present rule as to the extent to which a Federal administrative agency and its employees may be subpected to State and local taxation is announced by the

Supreme Court in Graves, et al. v. New York Ex Rel O'Keefe, 306 U. S. 466, 83 L. Ed. 927, which upheld the right of a State to impose a non-discriminatory income tax upon the salary of an employee of the Home Owners' Loan Corporation.

The opinion points out that a non-discriminatory tax on the income of an individual employed by the Federal agency does not directly burden the operation of the agency itself; that the same rule applies in this connection to the taxation of State salaries by the Federal Government and taxation of Federal salaries by State Governments, and regardless of whether the taxpayer is an employee or an officer, and that,

> "In on case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed."

There is nothing in the Graves opinion which modifies the long-established rule as to the immunity of all Federal financing agencies from interference with their functions by State or local taxation which exists under Section 8 of Article 1 of the Constitution. Likewise, the numerous decisions cited under Topic IV of petitioner's brief, pages 35 to 48, deal with various other types of taxes not involving this question.

The extent of the immunity of an instrumentality of Federal financing, and the necessity for such exemption, is stated by the Supreme Court in the Hibernia case, supra, as follows:

> "The basis of this exemption is the fact that a tax

upon the obligations of the United States is virtually a tax upon the credit of the government, and upon its power to raise money for the purpose of carrying on its civil and military operations. The efficiency of the government service cannot be impaired by a taxation of the agencies which it employs for such service, and, as one of the most valuable and best known of these agencies is the borrowing of money, a tax which diminishes in the slightest degree the value of the obligations issued by the government for that purpose impairs pro tanto their market value."

One of the more recent Supreme Court decisions which reaffirms the rule is Missouri Ex Rel Missouri Ins. Co. v. Gehner, 281 U. S. 313, 74 L. Ed. 870, holding that a State may not subject one to a greater burden upon his other taxable property by reason of his ownership of tax-exempt government securities and that,

> "It is elementary that the bonds or other securities of the United States may not be taxed by state authority. That immunity always has been deemed an attribute of national supremacy and essential to its maintenance. The power of Congress to borrow money on the credit of the United States would be burdened and might be destroyed by state taxation of the means employed for that purpose. As the tax-exempt feature tends to increase and is reflected in the market prices of such securities, a state tax burden thereon would adversely affect the terms upon which money may be borrowed to execute the purposes of the general government."

Tacitly conceding that a State cannot tax a Federal instrumentality for the raising of funds for governmental purposes, the Commissioner takes the position that the Postal Savings system is not a means of Federal financing but is simply a means of providing

local banking facilities to those numerous communities throughout the country who, at the time the original Act was passed in 1910, were without available capital or banking facilities. The brief, pages 18 to 22, inclusive, quotes at length from the platforms of the two parties, from the debates in Congress and from statements by succeeding Presidents, to the effect that under then existing conditions (which followed the panic of 1907 and before the enactment of a Federal Deposit Insurance Act), money deposited in local banks would be withdrawn and centralized in the financial centers and that the Postal Savings system would remedy this situation by localizing lendable funds and keeping them in circulation throughout the producing regions of the entire country.

It may be that such was the opinion of those participating in the Congressional debates in 1910, when the original Act was passed. However, Congressional debates are not of assistance to the Court in construing a statute unless the language of the Act itself is ambiguous or incomplete. They cannot be invoked to nullify an express provision of the statute as enacted, or as subsequently amended.

Section 759 of Title 39, U. S. C. A., subsequently enacted in 1912 and as amended in 1916, specifically provides for the use of the Postal Savings system as an agency for Federal financing, it being provided that,

> "When, in the judgment of the President, the general welfare and interests of the United States so require, the Board of Trustees may invest all or any part of the postal savings funds, except the reserve fund of 5 percentum herein provided for, in bonds or other securities of the United States."

The Act as amended having thus constituted the entire Postal Savings system, to the extent of 95% of its funds, into an available financing agency of the United States, its certificates would doubtless be beyond the reach of State or local taxation even if the Federal Government had not yet actually availed itself of the services of this fiscal agency. However, it is unnecessary to consider that question here because the Stipulation of Facts which has been filed by the parties shows that the Government has already invoked that power to make use of the System as a means of Federal financing and has actually borrowed practically every dollar available from that source. As of the end of the past fiscal year, on June 30, 1940, the report of the System which is incorporated in the Stipulation shows that there has accumulated in this fund more than one and one-third billion dollars, of which over 92% (and 95% of the balance to credit of the depositors) has been invested in securities of the United States.

These admitted facts show that the Postal Savings system, under the Act as now amended, is both legally and actually not only an agency of Federal financing, but a very substantial one.

This being true, it follows that the certificates issued by it as an incident to this method of Federal financing are exempt from State taxation "which diminishes in the slightest degree the value of the obligations" issued for that purpose, as held in the Hibernia case.

As pointed out in the Gehner opinion, the tax-exempt status of Federal securities renders them marketable and any State tax thereon "would adversely affect the terms upon which money may be borrowed to execute the purposes of the general government."

Applying this rule to the facts of the present case, it is obvious that this source of Federal financing, through which the Government is now borrowing one and one-third billion dollars, would be adversely affected if these Certificates which bear only 2% interest were subjected to the tax of 50c per $100.00 here involved, which would be equal to a gross income tax of 25% on the lender's return from them. Incidentally, this would be the situation only so long as the Kentucky taxing authorities do not procure the State Legislature to raise the present rate of 50c on intangibles, or modify or remove the present State exemption of intangibles from local taxation. It is a matter of common knowledge that formerly Kentucky subjected intangibles to both State and local taxation, the aggregate rate of which substantially exceeded the entire 2% return from these certificates, and also that at each session of the Legislature bills are put forward both to raise the existing State rate and to modify the existing exemption from local taxation. Also, any holding that these Postal Savings certificates are subject to taxation in Kentucky necessarily would subject them to whatever rates of State and local taxation are applicable to intangibles in any other State. It does not require argument to demonstrate that such a holding would directly and substantially impair the operation of this Federal agency and the system of governmental financing which is now conducted through it.

The opinion of the Circuit Court of Appeals unanimously affirms the holding that the exaction is an unconstitutional burden upon the financial activities of the Federal Government, within the holding of the cases cited in the opinion.

III. THE PROPOSED TAX IS DISCRIMINATORY.

As a third, and additional, ground for invalidating the State tax here involved the District Court held that it is discriminatory. For the reason that the tax is clearly invalid upon both of the other two grounds assigned by the Court, in that the certificates sought to be taxed are exempt under Section 3701 of the Revised Statutes and also that this means of Federal financing is constitutionally exempt from such taxation, we do not believe that any extended discussion of this additional ground of invalidity is here necessary.

The District Court's opinion appearing in the transcrip summarizes the facts out of which the discrimination exists and also distinguishes the case of Madden v. Kentucky, 309 U. S. 83, 84 L. Ed. 590, on authority of which appellant sought to justify the admitted discrimination involved. Upon this the Court holds,

> "Thus by applying to them the so-called 'catch-all' provision of the statute, the State asserts the right to tax postal savings deposits at five times the rate imposed upon deposits in banks of the state.
>
> While the direct burden of the tax falls upon the owners of the intangible property rights evidenced by United States Postal Savings Certificates, it can scarcely be doubted that the effect of laying a tax load upon them which is substantially heavier than that imposed upon the holders of the same type of property within the state, represented by deposits in banks, will inevitably tend to curtail the use, cripple the growth and retard the development of the postal deposit facilities and thus injuriously affect the means employed by the Government to accomplish its purposes. See, Farmers & Mechanics Savings Bank v. Minnesota, 232 U. S.

516. No extraordinary gift of prophecy would seem to be required to forecast the ultimate fate of the Government's system of postal savings deposits if such discrimination against it by the states or other local taxing authorities be permissible.

The opinion of the Supreme Court in Madden v. Kentucky, 309 U. S. 83, which the state insists is authority sustaining the validity of such a variation in tax rates, even when affecting governmental agencies, deals only with the question under the due process, equal protection and privileges and immunities clauses of the Fourteenth Amendment. It has no application to or bearing upon the problem of inter-governmental taxation or the constitutional safeguards under which governmental functions are made secure from interference."

The majority opinion of the Circuit Court also affirms this additional ground of invalidity found by the District Court, in a detailed analysis of the authorities which fully covers the question.

It is respectfully submitted that the findings and judgment of the District Court invalidating the assessment, and the Circuit Court's affirmance of that pudgment, were correct and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBT. T. CALDWELL,

PORTER M. GRAY,

COUNSEL FOR TRUSTEE OF INLAND GAS CORPORATION,

Respondent.

500 500

POSTAL SAVINGS SYSTEM
The Faith of the
UNITED STATES OF AMERICA
Is Solemnly Pledged To The Payment of Deposits With Accrued Interest

Act of June 25, 1910

ASHLAND, KENTUCKY
Depository Office

1114
Serial Number

Name of Depositor

POST OFFICE DEPARTMENT

Date of Issue

Account Number

FIVE HUNDRED DOLLARS

Date When Interest Begins

Not Transferable
Not Negotiable

This certifies that the Sum of Five Hundred Dollars Has Been deposited with the Postal Savings System and Will be payable to the Depositor at the above named Depository Office with Interest at the rate of two per cent per annum payable annually on the presentation of this certificate properly endorsed.

Series of 1917

James A. Farley,
Postmaster General.

500 500

Reverse Side

Received the amount of this certificate and
$..... interest due thereon.

.....

The depositor must not indorse this Certificate until it is presented at the post office for payment.

INFORMATION FOR DEPOSITOR.

1. Before accepting this Certificate the depositor must see that the amount for which it is issued is correct.
2. If this certificate is lost, the depositor should immediately notify the postmaster at the post office where issued.
3. Certificates begin to draw interest from the first day of the month following the month in which issued.
4. The postmaster will stamp in the spaces below the dates on which annual interest payments are made, deferred payments covering two or more years to be stamped separately in the spaces provided or the several years.

Number of Years	Total Accrued Interest	Interest Accruing Annually	Dates of annual interest payments of ten dollars each

(Schedule of interest, 1 to 10 years, follows).